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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

The right to a fair trial: Current recognition and measures necessary for its strengthening

Final report prepared by Mr. Stanislav Chernichenko
and Mr. William Treat

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Introduction

1. In its resolution 1989/27 of 1 September 1989, the Sub-Commission decided to appoint two of its members as rapporteurs to prepare a report on existing international norms and standards pertaining to the right to a fair trial. The Sub-Commission also requested that the rapporteurs recommend which provisions guaranteeing the right to a fair trial should be made non-derogable.

2. On 7 March 1990, the Commission on Human Rights in its decision 1990/108 welcomed the decision of the Sub-Commission to appoint Mr. Stanislav Chernichenko and Mr. William Treat as rapporteurs to prepare a report on existing international norms and standards pertaining to the right to a fair trial and requested the Sub-Commission to consider the report, at its forty-second session, under agenda item 10(d) entitled "Administration of Justice and the human rights of detainees: the right to a fair trial".

3. The two members of the Sub-Commission submitted a brief preparatory report (E/CN.4/Sub.2/1990/34) to provide an overview of the subject and to indicate the areas where further study was needed. In their brief preparatory report they also made some general observations and set forth the principal treaties and other international human rights standards which provide the strongest protection for the right to a fair trial. Further, they discussed considerations relevant to making non-derogable the right to a fair trial. In addition, they recommended a more comprehensive study of the right to a fair trial and how that right might be strengthened.

4. In its resolution 1990/18 of 30 August 1990, the Sub-Commission recommended to the Commission on Human Rights and the Economic and Social Council that they endorse the decision to entrust Mr. Stanislav Chernichenko and Mr. William Treat with the preparation of a study entitled "The right to a fair trial: current recognition and measures necessary for its strengthening."

5. The Commission, in resolution 1991/43 of 5 March 1991 and the Economic and Social Council in its resolution 1991/28 endorsed that decision and requested the Special Rapporteurs to draft a questionnaire on the right to a fair trial.

6. The two Special Rapporteurs prepared their preliminary report (E/CN.4/Sub.2/1991/29) consisting principally of a summary of the interpretations of the right to a fair trial by the Human Rights Committee and also including a revised questionnaire relating to national practices regarding the right to a fair trial.

7. In resolution 1991/14 of the Sub-Commission, resolution 1992/34 of the Commission, and decision 1992/230 of the Economic and Social Council, the two Special Rapporteurs were asked to continue their study of the right to a fair trial.

8. In August 1992 the two Special Rapporteurs submitted to the Sub-Commission a progress report on the right to a fair trial (E/CN.4/Sub.2/1992/24). That progress report had three addenda. Addendum 1 consisted of a study of the interpretations of international fair trial norms by the European Commission and Court of Human Rights. Addendum 2 evaluated the interpretations of international fair trial norms by the Inter-American Commission on and Court of Human Rights. Addendum 3 consisted of a study of the right to amparo, habeas corpus, and similar procedures.

9. In its resolution 1992/21 of 27 August 1992 the Sub-Commission requested the Special Rapporteurs to continue their study, but also asked Mr. Fisseha Yimer to serve as the principal commentator on the study without prejudice to the right of all Sub-Commission members to make comments and express their opinions. By its decision 1993/106 of 5 March 1993 the Commission endorsed the Sub-Commission's request, which was approved by the Economic and Social Council in its decision 1993/291 of 20 July 1993.

10. In August 1993 the two Special Rapporteurs presented to the Sub-Commission their progress report on the right to a fair trial (E/CN.4/Sub.2/1993/24 and Add.1-2). That progress report contained a preliminary draft of a third optional protocol to the International Covenant on Civil and Political Rights, aimed at guaranteeing under all circumstances the right to a fair trial and a remedy. The progress report had two addenda. Addendum 1 contained a preliminary draft declaration on the right to a fair trial and a remedy. Addendum 2 contained a summary of the information received by the Special Rapporteurs from non-governmental organizations concerning national laws and practices regarding the right to a fair trial and a remedy.

11. In its resolution 1993/26 of 25 August 1993 the Sub-Commission requested the Special Rapporteurs to submit to the Sub-Commission at its forty-sixth session their final report. The Commission, in its decision 1994/107 of 4 March 1994 endorsed the Sub-Commission's request. The Commission's decision specifically mentioned that the final report should include a set of conclusions and recommendations. The Commission also decided "to consider at its fifty-first session the final report of the Special Rapporteurs including, if appropriate, the desirability of a third optional protocol to the International Covenant on Civil and Political Rights, aimed at guaranteeing under all circumstances the right to a fair trial and a remedy, ...".

12. Chapter I of the present and final report summarizes the discussion of the preparatory, preliminary and progress reports. Chapter II summarizes fundamental sources of international fair trial norms identified since the inception of this study. Chapter III recognizes other developments related to the study of the right to a fair trial. Chapter IV summarizes interpretations of the right to a fair trial which have been made recently by the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Inter-American Commission on and Court of Human Rights, and the European

Commission and Court of Human Rights. Chapter V identifies the right to a fair trial as a non-derogable right and Chapter VI discusses the right to a remedy as a non-derogable right. Chapter VII contains conclusions and recommendations on strengthening the right to a fair trial and a remedy. Annex I contains the text of a revised draft third optional protocol to the International Covenant on Civil and Political Rights, aiming at guaranteeing under all circumstances the right to a fair trial and a remedy. Annex II contains a draft body of principles on the right to a fair trial and a remedy. Annex III contains a comprehensive bibliography of relevant material identified since the commencement of the study.

I. PREPARATORY, PRELIMINARY AND PROGRESS REPORTS - COMMENTS AND REVISIONS

13. This chapter summarizes the findings of the study on the right to a fair trial since its inception in 1989. This study provides a unique resource for lawyers, judges and others concerned with the administration of justice throughout the world on the prevailing international norms of the right to a fair trial and a remedy. Through a detailed look at the provisions guaranteeing the right to a fair trial and a remedy in international instruments and national laws, and the interpretations of those provisions by international and regional human rights bodies as well as by individual Governments, the Special Rapporteurs have brought together a comprehensive definition of the meaning of the right to a fair trial and a remedy. By identifying the prevailing meaning of the right to a fair trial, this study will serve as the cornerstone for the next task of providing further guarantees and strengthening the right to a fair trial and a remedy. With the advent of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia since 1991, the need for an international understanding of the right to a fair trial is more pressing now than when the Sub-Commission first requested this study. Further, the efforts of the Special Rapporteurs will also be relevant to the work of the International Law Commission which appears to be in the process of concluding its draft statute for an International Criminal Tribunal. Indeed, the Special Rapporteurs, as will be discussed in greater detail throughout this report, recommend that the material gathered in this report and their previous reports be made accessible to the International Tribunal for the former Yugoslavia and to the International Law Commission, as well as being distributed more broadly in a definitive United Nations publication on the right to a fair trial and a remedy.

14. The foundation for the study on the right to a fair trial was laid by the brief preparatory report (E/CN.4/Sub.2/1990/34). The brief preparatory report looked at the treaties and other instruments defining the attributes of the right to a fair trial and a remedy which are the most protective of the right. The principal treaties identified in the brief preparatory report which contain provisions on the right to a fair trial include the International Covenant on Civil and Political Rights; the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; the African Charter on Human and Peoples' Rights; the American Convention on Human Rights; the [European] Convention for the Protection of Human Rights and Fundamental Freedoms; the four Geneva Conventions of 12 August 1949 for the protection of war victims; and the two Additional Protocols of 1977 to the Geneva Conventions of 1949. The brief preparatory report also discussed other instruments with provisions on the right to a fair trial and a remedy including the Universal Declaration of Human Rights; the American Declaration of the Rights and Duties of Man; the Basic Principles on the Independence of the Judiciary; the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions; the Standard Minimum Rules for the Treatment of Prisoners; the Code of Conduct for Law Enforcement Officials; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"); Conclusion No. 44 of the Executive

Committee of the Programme of the United Nations High Commissioner for Refugees on the detention of refugees and asylum seekers; and the Concluding Document of the Vienna Follow-up Meeting of the Conference on Security and Co-operation in Europe.

15. The preliminary report (E/CN.4/Sub.2/1991/29) and the subsequent progress reports (E/CN.4/Sub.2/1992/24 and Add.1-3 and E/CN.4/Sub.2/1993/24 and Add.1-2) identified additional sources of fair trial norms, bearing in mind the previously established international fair trial norms outlined in the brief preparatory report. As a result, the reports submitted to the Sub-Commission thus far include the most comprehensive compilation of existing international fair trial norms and provide a unique resource for anyone interested in the right to a fair trial and a remedy.

16. Further, the preparatory, preliminary and progress reports contained excerpts from the General Comments of the Human Rights Committee as well as the Committee's interpretations of fair trial standards under articles of the International Covenant on Civil and Political Rights relevant to the right to a fair trial and a remedy. Moreover, addenda 1 and 2 to the 1992 progress report evaluated the interpretations of relevant international norms by the European Commission and Court of Human Rights as well as the Inter-American Commission on and Court of Human Rights. Interpretations of the recognized fair trial norms are of foremost importance because treaty rights mean little if they are not applied in practice.

17. In addition to the international and regional interpretations of the right to a fair trial, the preparatory and preliminary reports contained a questionnaire on national practices regarding the right to a fair trial. The 1992 progress report contained initial responses to the questionnaire and the 1993 progress report summarized the more detailed government responses to the questionnaire. The 1993 progress report also contained an addendum summarizing the information received by the Special Rapporteurs, principally from non-governmental organizations and bar associations, concerning national laws and practices relating to the right to a fair trial and a remedy (E/CN.4/Sub.2/1993/24/Add.2). The compilation of governmental interpretations provide an insight into a very extensive body of law and practice. These national interpretations, along with the international interpretations discussed above, form the basis for the draft third optional protocol to the International Covenant on Civil and Political Rights contained in the 1993 progress report, a revised version of which is contained in Annex I of the present final report. The Special Rapporteurs firmly believe that the third optional protocol, if adopted, would significantly strengthen the right to a fair trial and a remedy by making it a non-derogable right.

18. The preparatory, preliminary, and progress reports were discussed at the forty-second, forty-third, forty-fourth and forty-fifth sessions of the Sub-Commission and several useful comments were received. Sub-Commission members suggested that certain aspects of the right to a fair trial, for example, the right to petition for habeas corpus or amparo, should be made non-derogable even during periods of emergency. In this regard, the Sub-Commission in its resolution 1991/15 of 28 August 1991 on habeas corpus, recommended to the Commission to call on all States that had not yet done so "to establish a procedure such as habeas corpus by which anyone who is

deprived of his or her liberty by arrest or detention shall be entitled to institute proceedings before a court, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is found to be unlawful ... [and] to maintain the right to such a procedure at all times and under all circumstances, including during states of emergency.". In further response to the Sub-Commission members' comments regarding habeas corpus and amparo, addendum 3 to the 1992 progress report studied these and other similar procedures in greater detail, defining these procedures, identifying sources of international habeas corpus/amparo norms, and discussing the derogability of these procedures. The Special Rapporteurs noted that articles 2 (3), 9 (3) and 9 (4) of the International Covenant on Civil and Political Rights embody the essence of habeas corpus and amparo and should be made non-derogable.

19. Comments of the Sub-Commission members also reflected the need for coordination in regard to recommendations arising from the Sub-Commission studies on the right to a fair trial, states of emergency, and the independence of the judiciary and the protection of practising lawyers.

20. The two Special Rapporteurs welcomed the substantive comments and suggestions made by members and alternates of the Sub-Commission as well as by representatives of Governments and non-governmental organizations.

21. Pursuant to Sub-Commission resolution 1992/21 of 27 August 1992, which authorized Mr. Fisseha Yimer (Ethiopia) to serve as principal commentator for the study, Mr. Yimer submitted his comments and observations on the 1993 progress report to the 1993 session of the Sub-Commission. The Special Rapporteurs welcomed and found valuable Mr. Yimer's comments which focused almost entirely on the 1993 progress report.

22. Mr. Yimer began his observations by noting that the actual practice of the right to a fair trial was of paramount importance and that the Special Rapporteurs had paid special attention to the actual practice of States in the implementation of the right to a fair trial. Mr. Yimer focused on chapter I of the 1993 report, observing that the Special Rapporteurs should continue to place special emphasis on the institutions of amparo and habeas corpus and that the issue of the independence of the judiciary and practising lawyers should form an important component of the entire study. Mr. Yimer commented that the Special Rapporteurs' classification of chapter II as "additional sources of fair trial norms" appeared to be misleading because the norms identified were actually restatements of internationally recognized human rights and fundamental freedoms. Mr. Yimer's comments accurately reflect the 1993 report standing alone, yet the previous reports had summarized the principal international fair trial norms and, rather than republish the entire list of fair trial norms, due to space limitations, the 1993 report simply identified those "additional" sources which had recognized and adopted existing international fair trial standards.

23. Mr. Yimer commented that the governmental responses in chapter III were not extensive enough to warrant some of the general conclusions on national practices on the right to a fair trial. He further commented that, in the light of the importance of chapter III of the 1993 progress report, he found it to be more descriptive than analytical. The Special Rapporteurs share

Mr. Yimer's concern with the completeness of the national material made available to them for chapter III regarding 65 nations. The Special Rapporteurs believe, however, that the usefulness of chapter III and the overall strength of the study has been to collect the international interpretations on the right to a fair trial. The Special Rapporteurs have collected sufficient international and national materials to serve as the basis for drafting a third optional protocol to the International Covenant on Civil and Political Rights and a draft body of principles on the right to a fair trial and a remedy. The Special Rapporteurs concur with Mr. Yimer that further study of national practices might be undertaken by a later study.

24. Mr. Yimer commented that the proposed third optional protocol to the International Covenant on Civil and Political Rights would, if adopted, be a significant measure to strengthening the right to a fair trial.

25. Mr. Yimer questioned, however, whether the proposed draft declaration was necessary in light of the fact that the right to a fair trial has been provided for in article 10 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights. Mr. Yimer believed that the proposed declaration was simply a restatement of the fundamental provisions on the right to fair trial in existing human rights instruments. The Special Rapporteurs accept Mr. Yimer's concerns and, rather than preparing a draft declaration, the present final report contains in Annex II a draft body of principles which is intended to be a restatement of the existing international norms and not a new "declaration".

26. Mr. Yimer concluded his comments by questioning whether the issue of the death penalty came within the purview of the topic of the study of a right to a fair trial. The Special Rapporteurs agree that the death penalty is not an aspect of the right to a fair trial but, as recognized in the safeguards guaranteeing protection of the rights of those facing the death penalty (Economic and Social Council resolution 1984/50), the administration of the death penalty may raise particular fair trial concerns. States employing the death penalty, due to its finality, will want to ensure that those facing the punishment have first received a fair trial.

27. The Special Rapporteurs are grateful for the thoughtful comments of Mr. Yimer and have attempted to address many of his concerns in this final report.

28. The Special Rapporteurs also sought comments from Governments concerning the fourth report. Many Governments responded and the Special Rapporteurs would like to thank the Governments of Bangladesh, Canada, Chad, China, Egypt, Germany, Iraq, Italy, Jordan, Kuwait, Myanmar, Nepal, Niger, the Republic of Korea, Senegal and Turkey for their very thoughtful and helpful comments. The Governments of Canada, China, Egypt, Germany, Nepal, Niger and Senegal provided comments and corrections to the 1993 report, while the Governments of Bangladesh, Chad, Iraq, Italy, Jordan, Kuwait, Myanmar and the Republic of Korea responded to some of the non-governmental reports regarding national practices on the right to a fair trial contained in addendum 2 to the 1993 report. The Special Rapporteurs indicated that they would seek to reflect the comments received from Governments in further addenda to the 1993 progress report. Accordingly, the Special Rapporteurs anticipate the

circulation of a future document (E/CN.4/Sub.2/1994/25) containing the comments received from Governments - particularly in regard to the information contained in addendum 2. The Special Rapporteurs also expect that these comments will be reflected in a publication in the United Nations Study Series which will embody an updated and corrected compilation of the present report and the previous reports of this study on the right to a fair trial and a remedy.

29. One member of the Sub-Commission expressed the view that the draft protocol recommended by the Special Rapporteurs should be preceded by a declaration as had been the usual United Nations practice with regard to United Nations conventions. Indeed, for example, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child were both preceded by declarations. The Special Rapporteurs would like respectfully to point out, however, that while declarations have preceded conventions, they do not typically precede protocols. The two Optional Protocols to the International Covenant on Civil and Political Rights, for example, were not preceded by declarations. Moreover, the new optional protocol to the Torture Convention being drafted by the Commission on Human Rights, the draft protocols being drafted by the two open-ended working groups for the Convention on the Rights of the Child, the Additional Protocols of 1977 to the Geneva Conventions of 1949, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, and the 10 Protocols to the European Convention were all not preceded by a draft declaration.

30. Instead of the delay which typically accompanies the drafting of a declaration, the Special Rapporteurs recommend that the Commission on Human Rights establish an open-ended working group to complete the drafting of the third optional protocol and to permit Governments to provide their input as to the protocol.

II. FUNDAMENTAL SOURCES OF FAIR TRIAL STANDARDS AND NORMS

31. This chapter identifies and summarizes the fundamental standards of the right to a fair trial and a remedy identified in the first brief report (E/CN.4/Sub.2/1990/34) and updates those standards. The Special Rapporteurs recommend that a compilation of existing fair trial standards and norms be included in a publication in the United Nations Study Series. The compilation should contain a structural and textual summary of the principal treaties, other instruments, and interpretations of those instruments and treaties by international and regional human rights bodies relating to the right to a fair trial and a remedy, the original full text of those treaties and instruments, and a topical index which would permit the reader to find both the original text of the relevant instruments and the interpretations of those instruments by the various international and regional human rights bodies. The need of lawyers, judges, legislators and lay people worldwide for a more comprehensive review of existing fair trial standards and norms is one of the most compelling reasons to adopt the Special Rapporteurs' recommendation that a United Nations Study Series publication be issued.

32. This chapter begins with treaty provisions on the right to a fair trial and continues by identifying other instruments with provisions on and relevant to the right to a fair trial and a remedy. The chapter concludes with some general observations about these standards.

A. Treaty provisions on the right to a fair trial

33. Article 14 of the International Covenant on Civil and Political Rights recognizes the right to "a fair trial and public hearing by a competent, independent and impartial tribunal established by law". Every person is "equal before the courts and tribunals" under article 14 (1). Article 14 also distinguishes between the sort of fair hearing required for civil and criminal cases; most of article 14 deals with the "minimum guarantees" required in the determination of any criminal charge. Article 14 embodies the most comprehensive and important provisions protecting the right to a fair trial and thus needs to be made non-derogable even in times of emergency.

34. The African Charter on Human and Peoples' Rights (arts. 7 and 26), the Inter-American Convention on Human Rights (art. 8) and the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (art. 6) all contain fair trial provisions. The African Commission on Human and Peoples' Rights has adopted a Resolution on the Right to Recourse Procedure and Fair Trial which elaborates on article 7 (1) of the African Charter and guarantees several additional rights, including: notification of charges, appearance before a judicial officer, right to release pending trial, presumption of innocence, adequate preparation of the defence, speedy trial, examination of witnesses and the right to an interpreter (Doc. No. ACHPR/COMM/FIN(XI)/Annex VII, 9 March 1992). The African Charter does not contain a provision allowing States to derogate from their obligations under the treaty in times of public emergency.

35. Although article 27 of the Inter-American Convention authorizes the suspension of guarantees in "times of war, public danger, or other emergency that threatens the independence or security of" the Government, and does not

make article 8 (the right to a fair trial) a non-derogable right, article 27 does extend non-derogable status to "judicial guarantees essential for the protection of such rights" as the right to life, humane treatment and the other rights identified in article 27. Hence, a certain aspect of the right to a fair trial and a remedy has been made non-derogable by the Inter-American Convention.

36. Common article 3 of the four Geneva Conventions of 12 August 1949 for the protection of war victims and article 6 of Additional Protocol II of 1977 contain fair trial guarantees for times of non-international armed conflict. Articles 96 and 99-108 of the Third Geneva Convention prescribe the rights of prisoners of war in judicial proceedings, essentially creating a fair trial standard. Articles 54, 64-74 and 117-26 of the Fourth Geneva Convention contain provisions relating to the right to fair trial in occupied territories. Additional Protocol I (art. 75) extends fair trial guarantees in an international armed conflict to all persons, including those arrested for actions relating to the conflict. The Geneva Conventions and the two Additional Protocols assure the right to a fair trial even during periods of armed conflict.

37. The right to an effective remedy either by national tribunals or another national authority for violation of an individual's fundamental rights is an aspect of the right to a fair trial and is guaranteed by the International Covenant on Civil and Political Rights (arts. 2 (3), 9 (3), and 9 (4)), the American Convention (arts. 10, 25), and the European Convention (art. 13). For a more detailed discussion of the right to a remedy as a fundamental aspect of the right to a fair trial, see chapter VI, infra.

38. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides in article 15 "that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings ...". Also, article 7 guarantees fair treatment at all stages of the proceedings brought against a person charged with having engaged in or attempted torture. Article 2 (2) makes this convention non-derogable by providing that "[n]o exceptional circumstances whatsoever ... may be invoked as a justification of torture". Under this treaty, therefore, the accused person possesses a non-derogable right to be free from torture at all times during the criminal process, including interrogation, detention, trial, sentencing and punishment.

39. The Convention on the Rights of the Child contains several provisions relevant to the right to a fair trial for children. Article 37 (b) provides, for example, that "[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily". Furthermore, article 37 (d) provides that "[e]very child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action".

B. Other instruments with provisions on fair trial

40. Article 10 of the Universal Declaration of Human Rights provides, "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". Article 11 (1) protects the "right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence".

41. The Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly in its resolutions 40/32 of 29 November and 40/146 of 13 December 1985, help assure the right to a fair trial by preserving the independence and impartiality of the judiciary.

42. The Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted by the Economic and Social Council in its resolution 1989/65 of 24 May 1989, require the "thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions (principle 9)". To that end there are several principles relevant to the right to a fair trial, including principle 10 which indicates that the investigative authority shall have the power to oblige witnesses to appear and testify.

43. The Concluding Document of the Vienna Follow-Up Meeting of the Conference on Security and Cooperation in Europe (CSCE), issued 17 January 1989, indicates that the participants will "ensure effective remedies" and defines those remedies. The parties to the Vienna Concluding Document have also undertaken to observe the United Nations Standard Minimum Rules for the Treatment of Prisoners, to observe the United Nations Code of Conduct for Law Enforcement Officials, to prohibit torture and other ill-treatment, to protect individuals from psychiatric and other medical practices that violate human rights, and to limit the use of the death penalty. In June 1990 the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE adopted a document containing several provisions relating to the right to a fair trial. The Charter of Paris for a New Europe issued in November 1990 pursuant to a meeting of the CSCE states that everyone has the right "to know and act upon his rights [and] to fair and public trial if charged with an offence ...". The Concluding Document of the Moscow Meeting of the CSCE in 1991 stated that the participating States "will respect the internationally recognized standards that relate to the independence of the judges and legal practitioners ... which, inter alia, provide for (i) prohibiting improper influence on judges ... [and] (v) guaranteeing tenure and appropriate conditions of service ...".

44. Article 19 of the Declaration of Human Rights in Islam, adopted on 5 August 1990 at the Nineteenth Islamic Conference of Ministers of Foreign Affairs in Cairo, provides for equality of all individuals before the law, the right to a judicial remedy for each person, individual penal responsibility, no penalties except as prescribed by the Shariah, the presumption of innocence, and an honest trial in which the rights of defence are fully guaranteed. Article 20 forbids arrests, restraints on liberty, exile or punishment without legitimate reasons as well as torture and cruel, inhuman or

degrading treatment. Article 21 forbids the taking of hostages. Article 24 states that all the rights in the declaration are subordinate to principles of the Shariah.

45. Representatives of non-governmental organizations met in Tunis from 29 November to 2 December 1991 for the Arab-African Seminar on Criminal Justice and Penal Reform, held under the auspices of the Centre for Human Rights, the Tunisian League for Human Rights, Penal Reform International and the Arab Institute for Human Rights. The Seminar recommended that no person should be subjected to detention garde à vue for more than 24 hours; that any person placed in detention should immediately be permitted to contact his/her family and doctor; that interrogations should take place in the presence of a lawyer who may consult his/her client in private; that detention garde à vue should be permitted only in locations prescribed by law; that persons under detention garde à vue should not be subjected to pressure to incriminate themselves; that no one should be subject to torture, arbitrary arrest or preventive detention for his/her beliefs or religious convictions; that provisional detention should not be imposed as a sanction; and that public authorities should not make contact with persons in provisional detention prior to their appearance in court. The Seminar made a number of other recommendations in regard to the independence of the judiciary, the rights of the defence, penal reform and other related issues.

46. The attention of the Special Rapporteurs has been drawn to a very useful document entitled "Executive Action and the Rule of Law" prepared by the International Commission of Jurists as a result of a conference in Brazil in 1962. The document sets forth fundamental principles for a fair trial in administrative cases, including the requirement of adequate notice to interested parties; adequate opportunity for them to prepare the case, including access to relevant data; their right to be represented by counsel or other qualified person; adequate notice of the decision and the reasons; and their right to recourse to a higher administrative authority or court. The document indicates that it would be advisable for administrators to promulgate regulations after having secured expert advice, consult organizations or interested groups and give an opportunity to interested individuals to present their views.

C. Other provisions relevant to the right to a fair trial

47. Provisions prohibiting arbitrary arrest and detention may be found in the Universal Declaration (art. 9), the Civil and Political Covenant (art. 9), the African Charter (art. 6), the American Convention (art. 7), and the European Convention (art. 5).

48. Provisions against torture or other cruel, inhuman, or degrading treatment or punishment are contained in article 5 of the Universal Declaration, article 7 of the Civil and Political Covenant, articles 2-4 of the Convention against Torture, articles 2-4 of the Declaration against Torture, article 5 of the African Charter, article 5 of the American Convention and article 3 of the European Convention. During international armed conflicts, torture is forbidden by the First Geneva Convention, article 12; the Second Geneva Convention, article 12; the Third Geneva Convention, articles 17 and 87; the Fourth Geneva Convention, article 32; and

article 75 of Additional Protocol I. During non-international armed conflicts, torture is forbidden by common article 3 of the four Geneva Conventions and article 4 of Additional Protocol II.

49. The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly resolution 43/173 of 9 December 1988) establishes an obligation to inform detainees of their rights (principle 13), to bring detainees before a judicial or other authority promptly after arrest (principle 11) and to provide access to legal counsel (principle 17).

50. The Standard Minimum Rules for the Treatment of Prisoners contain several provisions which are relevant to the right to a fair trial, including the right to receive visits from a legal adviser (art. 93) within sight but not within the hearing of prison officials.

51. The Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/169 of 17 December 1979) requires in article 2 that law enforcement officials respect and protect the human rights of all persons, which would apparently include the right to a fair trial.

52. The Safeguards guaranteeing protection of the rights of those facing the death penalty (Economic and Social Council resolution 1984/50 of 25 May 1984) state that "[c]apital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right ... to adequate legal assistance at all stages of the proceedings". In addition, the Council, in resolution 1989/64 of 24 May 1989, Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, recommended that member States afford "special protection to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of their defence", and provided "for mandatory appeals or review with provisions for clemency or pardon in all cases of capital offence".

53. Provisions which prohibit use of ex post facto laws and retroactive punishment exist in the Universal Declaration (art. 11), the Civil and Political Covenant (art. 15), the African Charter (art. 7), the American Convention (art. 9) and the European Convention (art. 7).

54. Provisions prohibit imprisonment solely for breach of contract in the Civil and Political Covenant (art. 11), the American Convention (art. 7) and the Fourth Protocol to the European Convention.

55. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") contain provisions (rule 14.1) for a "fair and just trial" relating to juvenile offences.

56. Article 16 of the Convention relating to the Status of Refugees provides refugees with free access to courts of law and the same treatment as a national in regards to legal assistance in the refugee's country of habitual

residence. Article 1 (1) of the Protocol relating to the Status of Refugees applies article 16 of the Convention, inter alia, without geographical or time limitations.

57. There are numerous other provisions related to the right to a fair trial. Some of those other provisions may be found in the United Nations Rules for the Protection of Juveniles Deprived of their Liberty; the Basic Principles on the Role of Lawyers; the Guidelines on the Role of Prosecutors; the United Nations Standard Minimum Rules for Non-custodial Measures ("The Tokyo Rules"); the United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines"); the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; and the International Labour Organisation's Worker Tribunal Standards.

D. General observations regarding the right to a fair trial

58. The concept of "a fair trial" concerns both criminal and civil proceedings. Each type of proceeding has its own character. None the less, certain principles can be applied in any court - whether it be an emergency court, a military tribunal, a juvenile court, etc. If those principles are not observed in accordance with a modern concept of justice, the trial cannot be fair. Moreover, some of the principles of fairness also apply to cases in international courts and arbitration tribunals.

59. It is evident that general principles of law include principles of a procedural nature. Since the question of the right to a fair trial is examined in the context of human rights, particular attention should be given to procedural principles found in the domestic practices of Governments. Such principles may also be applied by international courts dealing with cases related to human rights, for example, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, the International Law Commission's proposed International Criminal Tribunal, the Nürnberg and Tokyo Tribunals, the European Court of Human Rights and the Inter-American Court of Human Rights. The ILC's draft statute for the proposed International Criminal Tribunal contains protection for the accused including the right to remain silent with no adverse consequences being drawn from the exercise of that right before any investigation by the prosecutor (art. 30 (4) (a)) and the right not to have evidence used against the accused which was obtained by illegal means constituting a serious violation of internationally protected human rights (art. 48).

60. Justice principally requires that a trial must be objective. Objectivity may have philosophical, moral and juridical aspects. Objectivity cannot solely be achieved by juridical measures. Certain economic, political and other conditions may be required in order for juridical protection to achieve an objective trial. Particular societies may have different ideas of objectivity and fairness. Differences in economic, social and cultural levels of development together with historical, religious and other factors may influence a society's understanding of objectivity and fairness. None the less, sufficiently clear views of fairness and objectivity have emerged such

that juridical criteria for an objective trial can be established. Such juridical criteria cannot provide a complete assurance, but they do contribute to the achievement of fair and objective trials.

61. It is widely believed that an objective trial is the same as a fair trial. There is, of course, a direct link, but there are different shades of meaning within the two concepts. Fairness relates to a sense that justice has been both accomplished and appeared to be accomplished. Objectivity considers whether the facts have been adduced, assessed according to the relevant law and appropriate procedures followed. It is difficult to draw a precise line between objectivity and fairness. In any case, it is necessary to define with precision what juridical measures will help to ensure the objectivity and hence, the fairness of a trial.

62. Possible juridical measures to ensure fairness may be very broadly categorized as (a) those measures relating to the organization of adjudicative bodies and (b) procedural guarantees for the conduct of the trial. Organizational matters are concerned with the procedures for appointing judges and other competent decision makers, etc. Procédural guarantees may also help to ensure the objectivity of court proceedings.

63. Essentially, all aspects of the organization of the judiciary should help create conditions for conducting judicial proceedings that exclude any outside influence on the court's evaluation of the facts and application of the law. Organizational measures for achieving fairness ultimately ensure the independence of judges as individuals and of the judiciary as a whole. Without these organizational measures, procedural guarantees of fairness will not be effective.

64. Means of guaranteeing the independence of the judiciary are closely linked to means for assuring the independence of lawyers and other representatives. Different approaches to independence may be appropriate for civil and criminal cases; but unless lawyers and other representatives are guaranteed independence, a fair trial cannot be ensured, even if the judges are independent. The independence and impartiality of judges, lawyers, assessors, and other participants in the judicial process have already been studied by the Sub-Commission on Prevention of Discrimination and Protection of Minorities (see E/CN.4/Sub.2/1993/25 and Add.1). None the less, it is appropriate to recall the importance of this issue - particularly in the preliminary investigation of criminal cases - as an essential requirement of a fair trial.

65. Procedural guarantees of the objectivity of courts can be characterized as conditions, methods, measures, etc. The commonly used term "guarantee" may give the misleading impression that a particular procedural right will assure objectivity. In fact, however, some procedures can help to ensure fairness while others may be less effective. None the less, each procedural right should not be assessed separately, because all procedural rights must combine to achieve fairness and objectivity. Procedural guarantees may be broadly divided into methods of conducting a trial and approaches to the submission and examination of evidence.

66. The relationship between the objectivity and impartiality of a trial deserves attention. These two concepts are closely related, but they may be distinguished in certain respects. Impartiality relates to the course of the trial and indicates that the judge or trier of fact will not favour one party or other during the trial and the parties will have equal opportunity to present their positions. Impartiality also describes the appropriate attitude of the court to the case being tried and that there will be an unbiased assessment of the evidence. Objectivity relates to the correctness of a trial's procedures, in other words, the way evidence is evaluated so as to select the most effective juridical approach to discover the truth.

67. The concepts of independence, impartiality, objectivity, and fairness of a trial are interrelated: independence is a prerequisite and essential condition for the impartiality of a trial, although it is not a complete guarantee of impartiality. Impartiality is the best, albeit incomplete, guarantee of objectivity. In almost all cases, the objectivity of a trial indicates its fairness. Fairness may not be achieved in certain situations, however, if the court applies outdated or otherwise inappropriate legislation, laws, or precedents.

68. Another important prerequisite of a fair trial is the competence of the judges, who should possess a high level of professional training and experience. Judges should also possess high moral integrity, which, although difficult to measure precisely, is as important as other requirements of a fair trial. In addition, lawyers participating in the trial should be competent and independent.

69. Impartiality and objectivity are two criteria for a fair trial and these criteria must be fulfilled by specific procedural guarantees. Countries have adopted various procedures for assuring a fair trial, including a public hearing, proceedings in which all parties are permitted to participate, the right of the parties and of witnesses to use their own language (including the provision of translation), prohibition of any kind of influence on the court to undermine its independence (for example, attempts to exert pressure, infringement on the secrecy of deliberations, etc.), and the right to counsel or other representative. These procedures provide the minimum guarantees for an objective trial in both civil and criminal proceedings, although the procedures may be applied in different ways as required by the type of proceeding. These procedural guarantees are found in the principal international standards for the administration of justice. None the less, the incorporation of guarantees in international standards cannot assure that the procedures will be implemented successfully at the national level. Therefore, it is desirable to consider means of strengthening implementation.

70. Accordingly, the Special Rapporteurs recommend that the draft third optional protocol contained in annex II to this report be adopted. Adoption of this protocol will certainly strengthen the right to a fair trial and a remedy by making it a non-derogable right during periods of public emergency. Moreover, by compiling the reports of this study and publishing them in the United Nations Study Series, the resources gathered by the Special Rapporteurs can serve as a valuable resource for anyone interested in protecting the right to a fair trial and a remedy.

III. OTHER DEVELOPMENTS RELATED TO THE STUDY OF THE RIGHT TO A FAIR TRIAL

A. Developments within the United Nations

71. In January 1993 the Working Group on Arbitrary Detention of the Commission on Human Rights issued its second report (E/CN.4/1993/24) in which it rendered its first decisions in regard to communications which had been submitted. The Working Group considered several communications which stated that a person had been imprisoned without a trial or after a trial failing to comport with international fair trial standards. Accordingly, the Working Group determined whether procedures followed in particular cases violated international fair trial norms and could thus be considered to be "arbitrary" within its mandate.

72. The Working Group on Arbitrary Detention also commented on the practice of several countries in establishing special courts, including emergency courts, revolutionary courts, military courts, people's courts, or courts of State security. The Working Group observed,

> "Admittedly, courts of this kind do not seem to be strictly inconsistent with international rules. However, experience unfortunately proves (and the examples of many cases submitted to the Group shows) that in many States they are being used more and more, or even being established for the purpose, to try dissidents and opponents who are then denied any guarantee to the right to be heard by an independent and impartial tribunal. The Working Group therefore shares the Commission's concern, reflected in resolution 1992/31, about respect for the protection of all persons in the administration of justice, and it considers that the human right to be heard by an independent and impartial tribunal is the very essence of the human right to justice (E/CN.4/1993/24, para. 34)."

73. Furthermore, the Working Group on Arbitrary Detention recommended "strengthening the institution of habeas corpus". The Commission on Human Rights responded to this recommendation in its resolution 1993/36 of 5 March 1993. In that resolution the Commission encouraged States, in accordance with its resolution 1992/35 of 28 February 1992 "to establish a procedure such as habeas corpus and maintain it in all circumstances, including during states of emergency". In its resolution 1994/32 of 4 March 1994 the Commission reiterated its encouragement of States "to establish a procedure such as habeas corpus or a similar procedure as a personal right not subject to derogation, including during states of emergency".

74. In its 1994 report (E/CN.4/1994/27) the Working Group on Arbitrary Detention continued its practice of deciding cases relevant to the right to a fair trial. The Working Group also reported (para. 36) that, regrettably, in many countries habeas corpus procedures did not exist, had been suspended, were not readily available or had not been used. The Working Group also indicated (para. 75) its support for the efforts of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to elaborate a declaration on habeas corpus with a view to arriving at an additional protocol to the International Covenant on Civil and Political Rights.

75. In this regard, the Chilean delegation's comments at the fiftieth session of the Commission on Human Rights are relevant. The Chilean delegate stated that his delegation supported the need for an additional protocol to assure the right to habeas corpus. Although articles 2 (3), 9 (2) and (3) of the International Covenant on Civil and Political Rights already contained the substance of the habeas corpus procedure without using the term "habeas corpus", there was still a need for a protocol to the Covenant making articles 2 (3), 9 (3), and 9 (4) non-derogable. The Chilean delegation further expressed its support for the work of the two Sub-Commission experts, Stanislav Chernichenko and William Treat, to draft a third optional protocol to the International Covenant on Civil and Political Rights making non-derogable the rights to a fair trial under article 14 and habeas corpus under articles 2 (3), 9 (3) and 9 (4). The Chilean delegation stated that it looked forward to considering their draft optional protocol when it was submitted to the Commission at its fifty-first session.

76. In June 1993, Mr. Leandro Despouy (Argentina) presented his sixth annual report on states of emergency to the Sub-Commission (E/CN.4/Sub.2/1993/23). Mr. Despouy identified 83 countries which had declared states of emergency since 1985. Mr. Despouy also identified those countries in which exceptional measures had been adopted without an official proclamation of a state of emergency, that is de facto states of emergency. Mr. Despouy has received valuable and pertinent observations concerning the draft guidelines for the development of legislation on states of emergency, including the question of non-derogable rights.

77. In July 1993, Mr. Louis Joinet (France) presented his final report on the independence of the judiciary and the protection of practising lawyers to the Sub-Commission (E/CN.4/Sub.2/1993/25 and Add.1) pursuant to Sub-Commission resolution 1992/38. The report provided detailed information on measures and practices adopted by various countries which had either strengthened or weakened safeguards for judicial independence, and discussed reinforcement of cooperation between United Nations programmes to guarantee the independence and impartiality of the judiciary and the establishment of a monitoring mechanism. Accordingly, in its resolution 1994/41 of 4 March 1994 the Commission established a thematic Special Rapporteur on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers.

78. In August 1993, the Sub-Commission's Working Group on Detention convened and reported on developments concerning human rights of persons subjected to detention or imprisonment, habeas corpus, the death penalty, juvenile justice, etc.

79. In July 1993, Special Rapporteur Theo van Boven presented his final report concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms (E/CN.4/Sub.2/1993/8). Mr. van Boven discussed State responsibility, relevant decisions and views of international human rights organs, national laws and practices, the issue of impunity in relation to the right to reparation for victims of gross violations of human rights, and proposed basic principles and guidelines concerning reparation to victims of gross violations of human rights.

B. Establishment of the International Tribunal for Violations of Humanitarian Law Committed in the territory of the former Yugoslavia since 1991

80. On 22 February 1993 the Security Council adopted resolution 808 (1993) in which it decided that an international tribunal should be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, and requested the Secretary-General to submit a report to the Council on all aspects of the matter including specific proposals for the effective and expeditious implementation of the decision.

81. On 3 May 1993 the Secretary-General issued a report (S/25704 and Add.1) proposing the establishment of an international tribunal as requested by the Security Council in its resolution 808 (1993) and recommending a Statute for the tribunal. On 25 May 1993 the Security Council adopted resolution 827 (1993) in which it approved the Secretary-General's report and established "an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991" and a later date to be determined by the Security Council. Article 15 of the Statute of the International Tribunal authorizes the judges of the International Tribunal to "adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims, and witnesses and other matters". Article 20 of the Statute provides that the Trial Chambers of the International Tribunal "shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses". Articles 20 through 26 contain more specific provisions relating to the right to a fair trial, judgement and appeal. In particular, most of the fair trial provisions in article 14 of the International Covenant on Civil and Political Rights are reproduced in article 21 of the Statute, although the Covenant is not mentioned as such.

82. The International Tribunal adopted rules of procedure and evidence on 11 February 1994. The rules provide many of the same protections which are found in the Body of Principles contained in annex II of this report, although phrased in much more general terms. The rules contain safeguards designed to ensure the impartiality of the tribunal (rules 14-36), ensure the suspect's right to free counsel and the assistance of an interpreter (42), provide for the video- or audio-taping of all suspect questioning (43), contain procedural safeguards for all indictments and arrest warrants (47-61), require that all accused be brought promptly before the tribunal (62), do not allow the suspect to be questioned without counsel present (63), require the prosecution to disclose all exculpatory evidence to the accused (68), allow the judges to close the proceedings to the public in certain circumstances (79), and provide for appeal (107-122) and pardon (123-125) procedures. The rules also provide, however, for the pre-trial release of a suspect only in exceptional circumstances - thus making pre-trial detention the rule rather than the exception.

83. The Rules of Procedure and Evidence for the International Tribunal fail to address, however, some important components of the right to a fair trial. There is no mention, for example, of the treatment of pre-trial detainees, such as the right to immediate notice to families of one's detention or prompt access to one's family (rule 92, United Nations Standard Minimum Rules for the Treatment of Prisoners), the right not to be tortured or subjected to other cruel, inhuman or degrading treatment or punishment (art. 7 of the Civil and Political Covenant). In all fairness to the International Tribunal, however, in his report on the Statute of the Tribunal the Secretary-General made clear that the enumeration of rights in the Statute did not exclude any other internationally recognized right so that the Tribunal could take into account other concepts of fairness. Presumably, then, the International Tribunal will adhere to the well-established international safeguards not specifically enumerated in its Statute or Rules of Procedure and Evidence.

84. With the advent of the International Tribunal for the former Yugoslavia, the need for an international understanding of the right to a fair trial is more pressing than ever before. The eyes of the world will be watching and it is vital that the defendants are afforded a fair trial. The International Tribunal will need to assure the observance of at least the procedural safeguards afforded by the International Covenant on Civil and Political Rights and the other international instruments discussed in this study, even if they are not specifically enumerated in the Tribunal's rules and governing statute. The International Tribunal will also focus more clearly on the need for adopting a draft third optional protocol on the right to a fair trial and a remedy.

IV. INTERPRETATIONS OF THE RIGHT TO A FAIR TRIAL

85. The right to a fair trial has been a norm of international human rights law for over 40 years and a substantial body of interpretation has developed elaborating and construing this right. The three principal sources of interpretation of the right to a fair trial have been the Human Rights Committee, the European Commission and Court of Human Rights, and the Inter-American Commission on and Court of Human Rights. More recently, however, the Committee on the Elimination of Racial Discrimination has also undertaken a role in interpreting the right to a fair trial. Previous reports in this study contained extensive summaries of interpretations of the right to a fair trial by these bodies. This chapter continues that practice by providing a summary of the more recent interpretations of the right to a fair trial. The chapter organizes the summaries based on the outline of the final publication of this study. All subjects do not have a corresponding interpretation since these interpretations reflect only recent cases. The final publication will contain, however, fair trial interpretations for every outline entry, based on the materials collected in the previous reports under this study as updated by the most recent developments. The chapter begins with summaries of recent decisions on standards applicable to all adjudicative proceedings by the European Commission and Court of Human Rights. It then continues with summaries of recent decisions relating to further standards applicable in criminal cases by the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Working Group on Arbitrary Detention, the Inter-American Commission on and Court of Human Rights, and the European Commission and Court of Human Rights.

I. Standards in All Adjudicative Proceedings

A. Introduction

B. Notice

C. Fair hearing

D. Public hearing

E. Independent and impartial tribunal

86. In Demicoli v. Malta (decision of 27 August 1991), the European Court of Human Rights held unanimously that there had been a breach of article 6 (1) of the European Convention since the applicant had not received a fair and public hearing for the charge of breach of privilege concerning alleged defamation of members of the Maltese House of Representatives. The proceedings against the applicant were conducted by the members of the Maltese House of Representatives, which found the applicant guilty of defamation as editor of a political satirical periodical. The Court took the view that the House of Representatives could not be considered to be a court and did not fulfil the requirements of the Convention as to independence or impartiality.

F. Methods of conducting a trial

G. Approaches to the submission and evaluation of evidence

87. In Kraska v. Switzerland (decision of 19 April 1993), the European Court of Human Rights ruled that the failure of a member of the Federal Court of Switzerland to read thoroughly the whole file concerning a public law appeal did not prejudice that Court's later decision. The applicant possessed a medical diploma and wished to practise medicine in the private sector. Article 6, section 1, of the European Convention on Human Rights places a competent court under the duty to conduct a proper examination of submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision. Certain remarks made by a Federal Court judge left the applicant's lawyer with the impression that the judge did not have sufficient knowledge of the file. The importance of appearances in the administration of justice was acknowledged, but the Court stated that misgivings of individuals must be objectively justified. The applicant's complaint was unfounded, on account, inter alia, of the active part played by the judge in question during the deliberations.

H. Interpreter

I. Counsel

88. In Megyeri v. Germany (decision of 12 May 1992), the European Court of Human Rights held unanimously that there had been a violation of article 5 (4) of the European Convention because the applicant had not been assisted by a lawyer in proceedings concerning his possible release from detention in a psychiatric hospital. The Court stated that a person confined in a psychiatric institution for the commission of acts constituting criminal offences as to which he was not responsible on account of mental illness should, unless there are special circumstances, receive legal assistance in subsequent proceedings reviewing his detention.

J. Adequate time and facilities for the defence

K. Witnesses

L. Appeal

M. Remedy

II. Standards in Criminal Cases

A. Introduction

B. Notice

1. Right to be informed promptly of charges

89. Brannigan and McBride v. UK (decision of 26 May 1993) involved the arrest of suspected Irish Republican Army members who were believed to be involved in terrorist activities against the Government of the United Kingdom in Northern Ireland. The European Court of Human Rights grappled with the issue of the detention for over six and four days respectively of the suspected terrorists before being brought before a tribunal. The Court reasoned that derogation

from guarantees under article 5 was in conformity with article 15 of the European Convention. Having regarded the nature of the terrorist threat in Northern Ireland, the limited scope of the derogation and the reasons advanced in support of it, as well as the existence of basic safeguards against abuse, the Court took the view that the Government did not exceed its margin of appreciation in considering that the derogation was strictly required by the exigencies of the situation.

90. In decision No. 4/1993 (Philippines) (E/CN.4/1994/27 at 46), the Working Group on Arbitrary Detention held that the practice of arresting persons without a warrant, not informing them of the reasons for their arrest, and not filing charges against them within a reasonable period of time would render their detention arbitrary in contravention of articles 8, 9, 10, and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights. In this particular communication, five Philippine nationals were arrested without warrant in 1990 and 1991 and none have had formal charges filed against them nor have they been informed individually of the reasons for their arrest. The Philippine Government failed to provide any information concerning the communication. The Working Group requested that the Government take the necessary steps to remedy the situation, so as to comply with the provisions and principles incorporated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

91. In decision No. 45/1992 (Ethiopia) (E/CN.4/1994/27 at 28), the Working Group on Arbitrary Detention held that the detention of three Ethiopians without charge and without the ability to challenge their detention through any judicial or administrative procedure was arbitrary and deprived them of their right to use judicial procedure for appealing against their detention and of their right to a fair trial, as guaranteed by articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights. The three detainees are former high government officials reportedly being held for war crimes and human rights violations under the former Government. The Working Group requested that the Government of Ethiopia take the necessary steps to remedy the situation, so as to comply with the provisions and principles incorporated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

92. In Henry Kalenga v. Zambia (comm. No. 326/1988), the author of the communication, a Zambian citizen, was arrested and detained for over nine months for political offences. He was not formally informed about the reasons for his arrest for over a month after his arrest. During detention, he was frequently deprived of food, access to recreation as well as medical assistance, and subjected to various forms of psychological torture. The Human Rights Committee, in its views of 27 July 1993, was of the opinion that the uncontested response of the Zambian authorities to Mr. Kalenga's attempts to express his opinions freely and to disseminate the tenets of the People's Redemption Organisation constituted a violation of his rights under article 19 of the International Covenant on Civil and Political Rights. The Committee was also of the opinion that Mr. Kalenga's right under article 9 (2) to be promptly informed about the reasons for his arrest and of the charges against him had been violated, as it took the authorities almost one month to inform

him. Similarly, the Committee found a violation of article 9 (3), as Mr. Kalenga was not brought promptly before a judge or other officer authorized by law to exercise judicial power. Additionally, the Committee considered that the State party violated Mr. Kalenga's right under article 10 (1) to be treated with humanity and respect for the inherent dignity of his person by its occasional deprivation of food and failure to provide needed medical assistance.

93. In Glenford Campbell v. Jamaica (comm. No. 248/1987), Mr. Campbell was convicted of murder. The Human Rights Committee, in views adopted 30 March 1992, found violations of the International Covenant on Civil and Political Rights because the author had not been promptly informed of the charges against him upon his arrest, nor was he brought promptly before a judge or other officer authorized by law to exercise judicial power. In addition, the author's legal aid representative had failed to raise objections to the prosecution's case, despite specific instructions from the author to this effect. Mr. Campbell was also unable to instruct his representative for the appeal. In addition, the Committee found a violation of Mr. Campbell's right to life, since the final sentence of death had been imposed in violation of his right to a fair trial.

2. Rights relating to the bringing of charges

94. L.K. v. the Netherlands (comm. No. 4/1991) involved de facto housing discrimination by members of the neighbourhood where a foreign-born man wished to reside. The Committee on the Elimination of Racial Discrimination, in its opinion of 16 March 1993, found that the mere existence of a law making discrimination a criminal act was insufficient and thus decided that the State's obligation to treat instances of racial discrimination with particular attention was missing. The police and judicial proceedings in the case did not afford the applicant effective protection and remedies within the meaning of article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. The Committee ordered the Netherlands to compensate the author and report back to the Committee on measures taken to remedy the situation.

C. Presumption of innocence

95. Articles 1, 2, 4 (1), 5 (2), 7 (1), 7 (2), 7 (3), 25 (1), and 25 (2) of the American Convention on Human Rights were cited as being violated in Gangaram-Panday v. Suriname (case No. 10.274), in which the author complained that his brother, Mr. Asok Gangaram-Panday, was detained by the Military Police when he arrived at Zanderij Airport in Paramaribo. The Military Police at Fort Zeeland, where Mr. Gangaram-Panday was later detained, subsequently reported that he hanged himself. The Inter-American Court, in its decision of 4 December 1991, rejected the preliminary objections interposed by the Government of Suriname of: (1) abuse of the rights conferred by the Convention; (2) non-exhaustion of domestic remedies; and (3) non-compliance of the provisions contained in articles 47 to 51 of the Convention. The Court decided to proceed with consideration of the case, postponing its decision on costs until such time as it renders judgement on the merits.

D. Right to humane treatment during detention

96. In the cases of Randolph Barrett v. Jamaica (comm. No. 270/1988) and Clyde Sutcliffe v. Jamaica (comm. No. 271/1988), both of whom were sentenced to death for murder, the Human Rights Committee had to determine whether prolonged judicial proceedings and concomitant prolonged periods of detention on death row may in themselves amount to cruel, inhuman and degrading treatment within the meaning of article 7 of the International Covenant on Civil and Political Rights. The Committee held, in views adopted 30 March 1992, that prolonged judicial proceedings did not constitute that kind of treatment per se, even if it might be a source of mental strain and tension for detained persons. This holding also applied to appeal and review proceedings in cases involving capital punishment, although an assessment of the particular circumstances of each case would be necessary.

97. The Committee further found that even prolonged periods of detention on death row under a severe custodial regime could not generally constitute cruel, inhuman or degrading treatment if the convicted person was merely availing himself of appellate remedies. The Committee found, however, that the beatings and injuries Mr. Sutcliffe suffered on death row violated his rights under the Covenant and recommended that he be awarded an appropriate remedy, including adequate compensation. No finding of violations of the Covenant was made in respect of Mr. Barrett.

98. In the murder case of Willard Collins v. Jamaica (comm. No. 240/1987), the author of the communication was a Jamaican citizen under sentence of death who alleged various irregularities in the course of the judicial proceedings against him, such as inadequate legal representation, unavailability of witnesses, and undue prolonging of the judicial procedures - all in violation of the rights found in the International Covenant on Civil and Political Rights. Mr. Collins also alleged that the judge presiding over his retrial should have been disqualified, in light of remarks prejudicial to the author's case he was said to have made at an earlier stage in the proceedings. Mr. Collins further alleged that there had been unlawful attempts at influencing the verdict of the jury. The Human Rights Committee, although not entertaining the allegations of judicial bias and attempts at jury tampering, none the less found violations of the author's right not to be subjected to cruel, inhuman and degrading treatment (arts. 6 and 10 (1)), on account of ill-treatment he had been subjected to on several occasions during his detention on death row. The Committee, in views adopted 1 November 1991, urged the State party to take measures to secure Mr. Collins' physical integrity, and to grant him an appropriate remedy for the violations suffered.

99. Articles 1, 2, 4 (1), 5 (2), 7 (1), 7 (2), 7 (3), 25 (1), and 25 (2) of the American Convention on Human Rights provide the rights of obligation to respect rights, domestic legal effects, life, humane treatment, personal liberty, and judicial protection. The Inter-American Court considered the case of Aloeboetoe et al. v. Suriname (case No. 10.150), wherein the author complained that more than 20 unarmed males were detained by government soldiers under suspicion that they were members of the Jungle Commando. Some of the detained men were seriously wounded with bayonets and knives and all were forced to lie face-down on the ground while the soldiers stepped on their backs and urinated on them. Seven detainees were blindfolded and dragged to a

military vehicle and driven to an area where they were later killed. The Court, in its decision of 4 December 1991, accepted Suriname's acknowledgment of responsibility and postponed judgement on reparations and costs.

E. Right to release pending trial

100. W. v. Switzerland (decision of 26 January 1993) involved the detention of a suspect whom authorities presumed would take flight at the first opportunity, as he had previously fled after an earlier arrest and release. The European Court of Human Rights determined that the dangers of absconding and collusion by the accused justified a period of pre-trial detention of over four years. The period did not exceed the "reasonable time" required under article 5 (3) of the European Convention. The dissent argued that there is a presumption of innocence and that protection of personal liberty is the rule, while detention should be the exception.

101. In Letellier v. France (decision of 26 June 1991), the European Court of Human Rights held that there had been a violation of article 5 (3) of the European Convention due to the excessive length of the applicant's pre-trial detention based on suspicion of her being an accessory to her husband's murder. The Court stressed the necessity of judicial authorities to establish with diligence the grounds for refusal to release a detained suspect. These grounds include the risk of pressure being brought to bear on witnesses, the danger of absconding, the inadequacy of court supervision, and the preservation of public order.

F. Methods of conducting a trial

1. Right to a trial without undue delay

102. Article 9 (3) of the International Covenant on Civil and Political Rights provides, inter alia, that anyone arrested or detained on a criminal charge shall be entitled to trial within a reasonable time or to release. Article 14 (3) (c), entitles everyone faced with a criminal charge to be tried without delay. In Fillastre v. Bolivia (comm. No. 336/1988), Mr. Andre Fillastre and Mr. Pierre Bizouarn, French citizens, were arrested on 3 September 1987 by the Bolivian police. On 12 September 1987, criminal proceedings were initiated against them on several charges, including the attempted kidnapping of a minor on behalf of the mother. When the Human Rights Committee considered the case, Mr. Fillastre and Mr. Bizouarn were still in detention, four years after their arrest, awaiting the decision of the court at first instance. Bolivia informed the Committee that if found guilty, the two detainees would face a sentence of up to five years' imprisonment. It pointed out that the delays in the judicial proceedings were due to the written procedure commonly followed in Bolivian criminal investigations and to budgetary problems facing the administration of justice. In finding a violation of the Covenant, the Committee, in its decision of 5 November 1991, considered that the information forwarded by Bolivia did not justify the unreasonable delay in arriving at a decision at first instance. The Committee requested Bolivia to release Mr. Fillastre and Mr. Bizouarn immediately.

103. In Angelucci v. Italy (decision of 19 February 1991), the European Court of Human Rights decided unanimously that there had been a violation of article 6 (1) of the European Convention because the prosecution of a businessman involved in a police raid of suspected illegal business activities was discharged more than eight years after the raid. The Court stated that the applicant's case had not been examined within a "reasonable time" as required under the Convention. The Court pointed out that under its case law on the subject, the reasonableness of the length of proceedings is to be assessed in the light of the particular circumstances of the case. The case was undoubtedly of some complexity owing to the number of accused. The Court, however, noted that there were very long periods of inactivity in the proceedings - at least as far as the applicant was concerned. Further, the accused did nothing to slow down the progress of the case. It followed that the Court could not regard as "reasonable" in the instant case a lapse of time of at least eight years and two months.

2. Right to be tried by an independent and impartial tribunal

104. In decision No. 40/1993 (Djibouti) (E/CN.4/1994/27 at 125), the Working Group on Arbitrary Detention held that the fact that the majority of judges at the trial consisted of government officials, was contrary to the requirement in article 14 of the International Covenant on Civil and Political Rights that the tribunal be independent. The Working Group further found that the Security Tribunal of the Republic of Djibouti's refusal to examine allegations that the confession of 14 individuals had been extracted under torture contravened internationally recognized standards relating to the right to a fair hearing and that non-observance of those provisions is such that it confers on the deprivation of freedom of the accused an arbitrary manner. The Government of the Republic of Djibouti failed to respond to the communication. The Working Group found that the arbitrary detention of the 14 individuals was in contravention of articles 5, 9 and 10 of the Universal Declaration of Human Rights and articles 7, 9 and 14, paragraphs 1, 2, 3 (d) and (e), of the International Covenant on Civil and Political Rights. The Working Group requested that the Government of the Republic of Djibouti take the necessary steps to remedy the situation, so as to comply with the provisions and principles incorporated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

105. In Pfeifer and Plankl v. Austria (decision of 25 February 1992), the correspondence between two detainees awaiting trial was read by the judges involved in their case. The letter was read by the same judges performing judicial and investigative functions. The European Court of Human Rights considered the investigating judge's censorship of a letter containing "jokes of an insulting nature against prison officers" as a violation of the right to an impartial tribunal. The Court decided that the right to have one's case heard by an impartial tribunal is established by law in article 6 (1) of the European Convention, and the right to respect for correspondence is established by article 8 of the Convention.

G. Right to defend himself/herself

106. In F.C.B. v. Italy (decision of 28 August 1991), the European Court held unanimously that the decision to try the applicant in his absence had violated section 1 in conjunction with section 3 (c) of article 6 of the European Convention. The accused was released from custody, then tried in absentia on appeal while subsequently in custody for other reasons in the Netherlands. He did not expressly (or at least in an unequivocal manner) waive his right to appear and defend himself. The Court reasoned that an applicant's indirect knowledge of his trial date does not meet the strict requirements for the State's diligence in following the provisions of article 6, sections 1 and 3, of the Convention.

H. Counsel

1. Right to free, effective legal representation

107. In decision No. 2/1992 (Lao People's Democratic Republic) (E/CN.4/1993/24 at 29), the Working Group on Arbitrary Detention held that detention of two Lao nationals in complete isolation with no charge, trial or access to a lawyer and with no ability to challenge the lawfulness of their detention, and the failure to provide the medical care their state of health required was arbitrary. The official media announced that the two individuals were to be questioned and tried under article 51 of the Criminal Code which prohibits treason, yet the Lao People's Democratic Republic failed to respond to the Working Group's communication. Accordingly, the Working Group found that the individuals' detention was in contravention of articles 9, 10, 11 and 19 of the Universal Declaration of Human Rights and articles 9, 14 and 19 of the International Covenant on Civil and Political Rights. The Working Group requested that the Government of the Lao People's Democratic Republic take the necessary steps to remedy the situation, so as to comply with the provisions and principles incorporated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

108. In Delroy Quelch v. Jamaica (comm. No. 292/1988), the Human Rights Committee noted with concern that the State party in its submission confined itself to issues of admissibility (Committee views adopted on 23 October 1992). Its failure to investigate in good faith all the allegations made against it had rendered the Committee's examination of the communication unduly difficult. With regard to the author's claim that he was not represented by counsel during the appeal proceedings, the written judgement of the Court of Appeal showed that his counsel was present during the hearing. The Committee was therefore of the view that the facts before it did not disclose a violation of article 14 of the International Covenant on Civil and Political Rights.

2. Right to communicate with counsel and have adequate time and facilities for the preparation of the defence

109. In decision No. 50/1993 (Peru) (E/CN.4/1994/27 at 144), the Working Group on Arbitrary Detention held that the incommunicado detention, torture, failure to specify reasons for their detention, or the inability to communicate with counsel of 13 Peruvian citizens accused of plotting to

assassinate the President of the Republic of Peru constituted violations of the rules of due process of law and that such contraventions made the deprivation of freedom during the first 15 days arbitrary. The Working Group noted, however, that planning armed conspiracy cannot be regarded as legitimate exercise of the right to freedom of association, expression or opinion or participation in political life, and that it constitutes an offence in all legislation and political systems. Accordingly, the detention beyond the 15 day incommunicado period cannot be considered arbitrary. The Working Group therefore transmitted the information on the presumed ill-treatment to the Special Rapporteur of the Commission on Human Rights on the question of torture.

110. In Dieter Wolf v. Panama (comm. No. 289/1988), Mr. Wolf, a German citizen who had been detained and convicted on charges of cheque fraud in Panama, claimed that he was not heard personally in any of the judicial proceedings against him; that he was never served a properly motivated indictment and was not brought promptly before a judge; that the proceedings against him were unreasonably prolonged; that he was at all times denied access to legal counsel; and that he was forced to perform hard labour in an island penitentiary. The Human Rights Committee, in views adopted on 26 March 1992, found violations of the articles in the International Covenant on Civil and Political Rights relating to: the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power; the right to be treated in detention with respect for the inherent dignity of the human person; the right of unconvicted prisoners to be segregated from convicted prisoners; the right to a fair trial by an independent and impartial tribunal; the right to adequate time and facilities for the preparation of the defence; and the right to legal representation. The Committee recommended that Mr. Wolf be provided a remedy.

111. In Campbell v. UK (decision of 25 March 1992), the European Court found that the control of a prisoner's correspondence with his solicitor and with the European Commission of Human Rights was incompatible with article 8 of the European Convention. Letters to and from a lawyer are privileged under article 8. Prison authorities, however, may open a letter from a lawyer to a prisoner where they have reasonable cause to believe that it contains an illicit enclosure, as long as suitable guarantees preventing the reading of a letter are provided, and that the reading of correspondence should only be permitted in exceptional circumstances. The Court stated that there is no pressing social need for the opening and reading of an applicant's correspondence with his solicitor. This kind of interference, the Court continued, is not necessary in a democratic society since the risk of abuse is so negligible that it must be discounted.

112. In S. v. Switzerland (decision of 28 November 1991), the European Court of Human Rights held unanimously that there had been a violation of article 6 (3) (c) of the European Convention because the applicant, while in pre-trial detention, had not been allowed to communicate freely with his lawyer for over seven months. A concurring opinion emphasized that the freedom and inviolability of communications between a person charged with a criminal offence and his counsel are among the fundamental requirements of a fair trial, inherent in the right to legal assistance, essential for effective exercise of that right, and that there can be no exception to this principle.

The dissent stressed that while in principle a defendant is allowed to communicate freely with his defence counsel, there are exceptional situations where surveillance of the defendant's communications with his counsel may be necessary and hence compatible with the principle. This exception is evidenced, according to the dissent, by the not so infrequent cases of serious collusion between lawyers and persons in custody which have occurred in several countries in recent years.

I. Right to free assistance of an interpreter

J. Rights during trial

113. In Decision No. 36/1993 (Indonesia) (E/CN.4/1994/27 at 116), the Working Group on Arbitrary Detention held that the Indonesian Government's reliance on tainted testimony vitiates the trial and renders the continued detention of Fernando de Araujo, a member of the National Resistance of East Timorese Students, arbitrary. Mr. de Araujo's conviction, based on the testimony of witnesses who could not be cross-examined on account of their absence and whose statements were relied on, despite the fact that they were made in the presence of police and other investigatory authorities, suggests that the testimony itself is tainted. The Working Group also found that the fact that Mr. de Araujo was subjected to beating and solitary confinement further points to the arbitrary nature of his detention and found that Mr. de Araujo's detention and ultimate conviction is in violation of articles 5, 9, 19, and 20 of the Universal Declaration of Human Rights and articles 7, 9, 10, 14, 19, and 21 of the International Covenant on Civil and Political Rights. The Indonesian Government failed to respond to the communication and the Working Group requested that the Government take the necessary steps to remedy the situation, so as to comply with the provisions and principles incorporated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

114. N.A.J. v. Jamaica (comm. No. 351/1989) concerned a Jamaican citizen under sentence of death for murder. The author claimed that his trial was unfair and that a number of irregularities had occurred in its conduct. The Human Rights Committee, in its decision on admissibility of 6 April 1992, decided that the communication was inadmissible under article 3 of the Optional Protocol to the International Covenant on Civil and Political Rights. It found that the allegations did not come within the scope of the Covenant under the right to a fair trial, as they related primarily to the judge's instructions to the jury and the evaluation of evidence, which are beyond the Committee's competence unless there is manifest partiality or arbitrariness on the part of the judge.

115. Article 14 (3) (e) of the Civil and Political Covenant provides that everyone charged with a crime has the right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The Human Rights Committee considered the case of Delroy Prince v. Jamaica (comm. No. 269/1987), wherein the author complained that witnesses on his behalf had been subjected to intimidation and therefore had failed to testify. He had not raised this matter, however, during trial. In the absence of further evidence, the Committee, in views adopted on 30 March 1992, found no violation of this article. The Committee also found that

Mr. Prince's claim that he was severely beaten upon his arrest was not substantiated; this allegation had been raised during the trial and rejected by the jury.

116. In Carlton Linton v. Jamaica (comm. No. 255/1987), the author claimed that he did not receive a fair trial because the judge improperly summarized the legal requirements of common design in relation to murder and manslaughter. The Human Rights Committee, in views adopted on 22 October 1992, noted with regret the absence of cooperation from the State party in not making any submissions concerning the substance of the matter under consideration. In respect of the claim of unfair trial, the Committee concluded that there had been no violation of article 14 of the International Covenant on Civil and Political Rights, as the material before it did not reveal that the jury instructions had been clearly arbitrary or amounted to a denial of justice, or that the judge had violated his obligation of independence and impartiality. In the absence of refutation by the State party, however, the physical abuse inflicted on the author while on death row, the mock execution set up by the prison warders, and the denial of adequate medical care after an aborted escape attempt constituted cruel and inhuman treatment under articles 7 and 10 of the Covenant. The Committee urged the State party to take effective steps to investigate the treatment to which Mr. Linton was subjected, to prosecute any persons responsible for his ill-treatment, and to grant him compensation.

117. In Denroy Gordon v. Jamaica (comm. No. 237/1987), the author claimed to be innocent of the verdict of murder and alleged that because the jurors were sympathetic to the deceased and his relatives, they did not base their decision on the facts of the case. The Human Rights Committee, in views adopted on 5 November 1992, could not conclude that the author's lawyers had been unable to prepare properly the case for the defence, found that the International Covenant on Civil and Political Rights does not provide an unlimited right to obtain the attendance of any witness requested by the accused or his counsel, and held that it would have been incumbent upon the author's counsel to raise on appeal the question of whether a verdict of manslaughter should have been left open to the jury. The facts before the Committee therefore disclosed no violation of any of the articles of the Covenant.

118. In S. v. UK (application No. 16757/90), the applicant complained that he did not receive a fair trial since he was unable to hear the witnesses giving evidence against him as a result of a glass screen in front of the dock. He invoked article 6 (1) of the European Convention, which entitles all to a "[f]air and public hearing . . . . " The Government submitted that the applicant's legal representatives were able to follow the proceedings and that the inability of the applicant to follow the proceedings was not brought to the attention of the trial court. The Government contended that it cannot be held responsible for the failure of the accused's legal representatives to raise the matter. The European Commission on Human Rights, in its decision of 10 February 1992, considered that the application raised serious issues of law and fact under the Convention, the determination of which should depend on an examination of the merits. The application was therefore declared admissible.

119. In Isgro v. Italy (decision of 19 February 1991), the European Court held unanimously that the applicant's criminal conviction, which had been based in part on the statements made by a witness before an investigating judge and read at the trial, had not infringed paragraph 3 (d) of article 6 of the European Convention, taken in conjunction with paragraph 1 thereof. The applicant's conviction was based essentially on records of statements made by a witness in the absence of the applicant and his lawyer during the investigative stage of the proceedings. Later, during trial, the witness was summoned to appear, but proved to be untraceable. The applicant complained that neither he nor his lawyer was able to examine the witness against him in order to establish a fair hearing by an impartial tribunal. The Court found that the evidence produced did not disclose any negligence on the part of the national authorities in seeking to secure the witness's appearance in court. The witness was not an anonymous witness - he was questioned by the investigating judge, who organized a confrontation between him and the applicant, and with a co-accused. The Court further found that the District Court and Court of Appeal did not base their decisions solely on the witness's statements, but also on other testimony and on the applicant's observations. Additionally, the applicant's lawyer had the possibility to challenge, during trial, the accuracy of the witness's allegations and the latter's credibility.

K. Right not to be held guilty of any criminal offence for an act or omission not constituting a criminal offence

120. In decision No. 18/1993 (Israel) (E/CN.4/1994/27 at 75), the Working Group on Arbitrary Detention held that the detention of Walid Zakut, a member of the Democratic Front for the Liberation of Palestine (DFLP), simply on the fact that he is a member of an organization provides no legal basis for the detention of a person. Even though the DFLP advocates violence and carries out acts of violence, the Working Group found that for such detention to be upheld as a preventive measure it must be shown that the person concerned has committed, or is in the process of committing acts in furtherance of the objectives of the organization of which he is a member. The Israeli Government failed to address the communication. Accordingly, the Working Group found that Walid Zakut's detention was in contravention of article 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights. The Working Group requested that the Government of Israel take the necessary steps to remedy the situation, so as to comply with the provisions and principles incorporated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

L. Right to an appeal

121. In Leroy Simmonds v. Jamaica (comm. No. 338/1988), a prisoner, who had been sentenced to death, claimed that he was not informed about either the date or outcome of his appeal from a sentence of death until two days after it had been dismissed. The Human Rights Committee, in views adopted on 23 October 1992, found a violation of article 14 of the International Covenant on Civil and Political Rights because the delay in notification of the hearing date jeopardized his opportunities to prepare his appeal and to consult with his court-appointed lawyer. It considered that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the

International Covenant on Civil and Political Rights had not been respected, if no further appeal against the sentence was available, would be a violation of article 6 concerning the right to life. The Committee was of the view that Mr. Simmonds was entitled to a remedy and requested the State party to provide information within 90 days on any relevant measures taken in respect of the Committee's wishes.

122. In G.J. v. Trinidad and Tobago (comm. No. 331/1988), a prisoner, who had been sentenced to death for murder, complained of irregularities during the conduct of his trial in the court of first instance. The Court of Appeal, although acknowledging that there had been irregularities during the trial at first instance, concluded that these defects had not affected the outcome of the trial and dismissed the prisoner's appeal. The Human Rights Committee (decision on admissibility of 5 November 1991), after examining the case, recalled that it is generally for the appellate courts of States parties to the International Covenant on Civil and Political Rights, and not for the Committee, to evaluate the facts and evidence and to review the interpretation of domestic law. Similarly, it is for appellate courts and not for the Committee to review the judge's attitude during the trial, unless it is apparent that the judge manifestly violated his obligations of impartiality.

123. In Alrick Thomas v. Jamaica (comm. No. 272/1988), Mr. Thomas, who had been sentenced to death for murder by the court of first instance, was informed about the date of the appeal hearing only after it had taken place. He was unable, therefore, to communicate with his legal representative, who withdrew the original ground of appeal without consulting his client. The Human Rights Committee, in views adopted on 31 March 1992, taking into account the combined effect of these circumstances, found that the appeal proceedings in this case did not meet the requirements of a fair trial under the International Covenant on Civil and Political Rights and requested Jamaica to offer Mr. Thomas an appropriate remedy.

124. In the murder cases of Raphael Henry v. Jamaica (comm. No. 230/1987), and Aston Little v. Jamaica (comm. No. 283/1988), the authors of the communications were Jamaican citizens under sentence of death who alleged various irregularities in the course of the judicial proceedings against them, such as inadequate legal representation, unavailability of witnesses, and undue prolonging of the judicial procedures - all in violation of the rights found in the International Covenant on Civil and Political Rights. In the former case the Human Rights Committee, in views adopted on 1 November 1991, due to the absence of a written judgement from the Court of Appeal of Jamaica, found a violation of the author's right to have his sentence reviewed by a higher tribunal as provided in article 14 (5) of the International Covenant on Civil and Political Rights. It found a similar violation, in views adopted on 1 November 1991, in the case of Mr. Little, who had also been unable to obtain a reasoned judgement from the Court of Appeal for many years. In Mr. Little's case, the Committee further found violations of the author's right to have sufficient time for the preparation of the defence (art. 14 (3) (b)), and because the witnesses on his behalf were not heard under the same conditions as the witnesses against him (art. 14 (3) (e)). In both cases, the Committee also found a violation of the author's right to life (art. 6), since the final sentence of death had been imposed in violation of their right to a fair trial.

M. Right not to be tried again for the same offence

125. In Juan Terán Jijón v. Ecuador (comm. No. 277/1988), Mr. Terán an Ecuadorian citizen who had been arrested in March 1986 in connection with an armed robbery, claimed to have been kept incommunicado after his arrest, to have suffered ill-treatment, and to have been forced to sign blank sheets of paper. He further alleged that he was not promptly brought before a judge and that after his release in March 1987, he was re-arrested and re-indicted for the same offence. The Human Rights Committee, in views adopted on 26 March 1992, considered the evidence sufficiently compelling to find a violation of the articles 7 and 10 (1) of the International Covenant on Civil and Political Rights. Regarding the re-arrest, re-indictment, and incommunicado detention, the Committee found further violations of the Covenant and recommended that the author be given an appropriate remedy, including compensation. It also called upon Ecuador to investigate the use to which papers signed by Mr. Terán under duress had been put, and to see that these documents were either returned to the author or destroyed. A Committee member appended an individual opinion on this point, finding a violation of article 14 (3)(g), which provides that no one may be compelled to testify against himself or confess guilt.

N. Juvenile procedures

O. Concluding remarks

126. The final publication of this study will update this chapter with the latest available interpretations on the right to a fair trial at the time the publication is compiled. Moreover, the final publication will categorize the interpretations by subject matter as indicated in the proposed outline contained in the recommendations section of chapter VII. This ordering will better facilitate the use of the interpretations as a reference tool for those interested in the substantive interpretations of the right to a fair trial and a remedy.

V. THE RIGHT TO A FAIR TRIAL AS A NON-DEROGABLE RIGHT

127. Under the International Covenant on Civil and Political Rights, the right to a fair trial and a remedy may at present be the subject of derogation and therefore the right to a fair trial and a remedy may be suspended in certain circumstances, such as times of public emergency.

128. Article 4 of the Civil and Political Covenant provides that in situations threatening the life of the nation, a Government may issue a formal declaration suspending most human rights as long as (1) the exigencies of the situation strictly require such a suspension, (2) the suspension does not conflict with the nation's other international obligations, and (3) the Government informs the United Nations Secretary-General immediately. The only rights that are not subject to suspension in this situation are those specified in article 4 of the Civil and Political Covenant as protected from derogation. These rights include freedom from discrimination based on race, colour, sex, language, religion, or social origin. The Civil and Political Covenant also does not permit any derogation from the rights to be free from arbitrary killing; torture or other cruel, inhuman or degrading treatment or punishment; slavery; imprisonment for debt; retroactive penalties; or failure to recognize a person before the law. It should be noted that the right to a fair trial and a remedy is not included in this provision.

129. Accordingly, in the 128 countries that have ratified the International Covenant on Civil and Political Rights as of 11 May 1994, some of the most important human rights would be protected as non-derogable rights. Such protection would encompass prohibitions against torture, inhuman treatment, and extrajudicial executions. Other rights, however, including the right to a fair trial and freedom from arbitrary arrest and detention, can provide effective safeguards of these non-derogable rights already included in article 4.

130. The Human Rights Committee has observed, "If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14" (A/39/40, p. 144, para. 4).

131. Probably at no other time will the right to a fair trial and a remedy be as important as it is during a time of civil or international conflict. Yet it is precisely at this time that the right to a fair trial becomes vulnerable under article 4 of the International Covenant on Civil and Political Rights.

132. The Convention against Torture does not permit derogation: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." (art. 2 (2)). Under this treaty the accused person possesses a non-derogable right to be free from torture at all times during the criminal process, including interrogation, detention, trial, sentencing, and punishment. Accordingly, evidence obtained as a result of

torture can never be permitted to be introduced. Also, persons accused of torture are guaranteed fair treatment at all stages of the proceedings under article 7.

133. The African Charter does not contain a provision allowing States to derogate from their obligations under the treaty in times of public emergency. Hence, it appears that derogation would not be permitted under the African Charter. Some commentators have suggested that the African Charter's use of broadly-worded limitation clauses in several provisions made it unnecessary for the African Charter to include the concept of derogation. Article 7 of the African Charter does not, however, contain any limitations:

> "1. Every individual shall have the right to have his cause heard. This comprises:
>
> (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
>
> (b) The right to be presumed innocent until proved guilty by a competent court or tribunal;
>
> (c) The right to defence, including the right to be defended by counsel of his choice;
>
> (d) The right to be tried within a reasonable time by an impartial court or tribunal.
>
> "2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender."

134. Similarly, article 26 of the African Charter, which guarantees the independence of the Courts, does not allow for either derogation or limitation in times of public emergency.

135. Article 27 of the American Convention authorizes the suspension of guarantees in "times of war, public danger, or other emergency that threatens the independence or security of the State Party ...". Article 27, however, does not authorize the suspension of several significant rights including the "Right to Life" (art. 4), "Right to Humane Treatment" (art. 5), "Freedom from Ex Post Facto Laws" (art. 9), "or of the judicial guarantees essential for the protection of such rights". Although article 27 does not make article 8 (the right to a fair trial) a non-derogable right, article 27 does extend non-derogable status to "judicial guarantees essential for the protection of such rights" as the right to life, humane treatment, and the other rights identified in article 27. Hence, a certain aspect of the right to a fair trial has been made non-derogable by the American Convention.

136. It is unclear what are the required "judicial guarantees" protected by article 27 as non-derogable, but presumably they include fair trial guarantees included in the American Convention (art. 8) - most of which relate to criminal trials:

(a) The right to a hearing "within a reasonable time, by a competent, independent and impartial tribunal" (art. 8 (1));

(b) The "right to be presumed innocent" (8 (2));

(c) The right to assistance by a translator or interpreter (8 (2) (a));

(d) "Prior notification in detail to the accused of the charges against him" (8 (2) (b));

(e) "Adequate time and means for the preparation of his defence" (8 (2) (c));

(f) The right to defend himself or assistance of "counsel of his own choosing, and to communicate freely and privately with his counsel" (8 (2) (d));

(g) The inalienable right to be assisted by counsel provided by the State" (8(2)(e));

(h) The right to examine and obtain appearance of witnesses in court (8 (2) (f));

(i) The "right not to be compelled to be a witness against himself or to plead guilty" (8 (2) (g));

(j) The "right to appeal the judgment to a higher court" (8 (2) (h));

(k) Confession of guilt by the accused must be "made without coercion of any kind" (8 (3));

(l) The right not to be subjected to double jeopardy (8 (4)); and

(m) A public trial, except to protect the interests of justice 8 (5)).

137. It is also important to note that the Geneva Conventions and the two Additional Protocols assure the right to a fair trial even during periods of armed conflict. For example, article 129 of the (Third) Geneva Convention relative to the treatment of Prisoners of War states, "In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by article 105." Article 105 includes the right to counsel, the calling of witnesses, the services of an interpreter when needed, the advising of these rights in due time before trial, the right to have competent counsel appointed for the accused, necessary time for preparation of the defence, right to consult with counsel, the right to be notified of the particulars of charges, and the right to have observers from the protecting Government present, unless there are exceptional circumstances. Article 130 of the Third Geneva Convention makes

"depriving a prisoner of war of the rights of fair and regular trial" a "grave breach". Under these provisions the right to a fair trial appears to be non-derogable, at least in times of international armed conflict.

138. As to non-international armed conflicts, common article 3 to the four Geneva Conventions prohibits a party to such a conflict from "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." The judicial guarantees are not specified but presumably reflect the safeguards identified by article 105 of the Third Geneva Convention, article 6 of Additional Protocol II, and evolving standards relating to the right to a fair trial and a remedy.

139. Article 6 of Additional Protocol II to the Geneva Conventions sets forth a number of fair trial rights applicable to non-international armed conflicts as defined in Protocol II:

(a) The right to be informed without delay of the particulars of the offence alleged and the right to "all necessary rights and means of defence";

(b) Individual penal responsibility;

(c) Punishment only on the basis of existing laws and the right to benefit from later laws which may reduce the penalty;

(d) Presumption of innocence;

(e) The accused's right to be present at trial;

(f) The right not to be compelled to testify or confess guilt;

(g) The right to be advised on conviction of rights and available remedies;

(h) The death penalty may not be imposed on persons who are under the age of 18 at the time of the offence; also pregnant women or mothers of young children may not be executed; and

(i) At the end of hostilities, the authorities shall grant the broadest possible amnesty.

140. Therefore, while the right to a fair trial has not been recognized as a non-derogable right in article 4 of the International Covenant on Civil and Political Rights, the African Charter, the American Convention, and the Geneva Conventions and Protocols indicate that aspects of the right to a fair trial have been accepted as non-derogable. Moreover, the broad framework of international standards related to fair trial which are not in the form of treaties, such as the Standard Minimum Rules for the Treatment of Prisoners, the Basic Principles on the Independence of the Judiciary, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the Basic Principles on the Role of Lawyers, and the Guidelines on the Role of Prosecutors, are intended to apply at all times. The right to

a fair trial, and as the next chapter makes clear, the ability to challenge the legality of one's detention, especially in times of public emergency, are essential to guaranteeing the right to a fair trial. For this very reason, it is essential that the draft third optional protocol to the International Covenant on Civil and Political Rights be adopted. This optional Protocol, if adopted, would make the provisions of the International Covenant on Civil and Political Rights guaranteeing a fair trial and a remedy non-derogable in all situations.

VI. THE RIGHT TO A REMEDY AS A NON-DEROGABLE RIGHT AS AN ESSENTIAL PART OF THE RIGHT TO A FAIR TRIAL

141. The right to an effective remedy is a fundamental aspect necessary to ensure the right to a fair trial. If habeas corpus and amparo are going to be effective remedies to protect other non-derogable rights, not only should they be non-derogable under all situations, but they should be in practice an efficacious means at all times, including periods of emergency, to challenge the legality of detention.

142. This view was expressed by members of the Sub-Commission during the discussions of the previous reports. Pursuant to these discussions and the request of the Sub-Commission contained in its resolution 1991/15, the Commission on Human Rights in its resolution 1992/35 called upon all States which had not yet done so to establish a procedure such as habeas corpus by which anyone who is deprived of his or her liberty by arrest or detention shall be entitled to institute proceedings before a court so that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is found to be unlawful. The Commission also called upon all States to maintain the right to such a procedure at all times and under all circumstances, including during states of emergency. The Commission in its resolution 1994/32 reiterated its encouragement of States "to establish a procedure such as habeas corpus or a similar procedure as a personal right not subject to derogation, including during states of emergency".

143. Other human rights bodies have recommended that remedies such as habeas corpus and amparo be made non-derogable. The Sub-Commission Working Group on Detention, for example, in its August 1993 report (E/CN.4/Sub.2/1993/22) discussed habeas corpus as a non-derogable right and as one of the requirements for the right to a fair trial. The members of the Working Group were of the opinion that the guarantees provided by habeas corpus should be incorporated into every country's national legislation as a non-derogable right. They also shared the view that States should maintain the right to habeas corpus at all times and under all circumstances, even in a state of emergency. The Working Group on Arbitrary Detention made similar observations in its 1994 report (E/CN.4/1994/27). Moreover, various other human rights bodies identified in the 1992 progress report (E/CN.4/Sub.2/1992/24/Add.3) also recognized the need for the non-derogability of these procedures.

144. When considering the requirements of a fair trial, both in civil and criminal cases, the court should apply those standards which are the most protective of the rights of the individual. Principal among the basic fair trial standards recognizing the right to a remedy are article 8 of the Universal Declaration of Human Rights, articles 2 (3) (b), 9 (3) and 9 (4) of the International Covenant on Civil and Political Rights, article 5 (4) of the European Convention, articles 7 (5) and 7 (6) of the American Convention on Human Rights, and articles 6 and 7 of the African Charter on Human and Peoples' Rights.

145. Article 8 of the Universal Declaration of Human Rights states, "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

146. Article 2 (3) (b) of the International Covenant on Civil and Political Rights provides that each State party undertakes "[t]o ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy."

147. Article 9 (3) of the International Covenant on Civil and Political Rights indicates that anyone "arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release."

148. Article 9 (4) of the International Covenant on Civil and Political Rights provides:

> "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

149. Articles 2 (3), 9 (3), and 9 (4) embody the essential characteristics of amparo and habeas corpus even though the words "in the nature of habeas corpus" from earlier drafts of the Covenant were deleted to allow States the freedom to fashion remedies through their own legal systems.

150. A provision similar to article 9 (4) of the International Covenant on Civil and Political Rights may be found in European Convention article 5 (4):

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

151. The equivalents of amparo/habeas corpus are also found in the American Convention on Human Rights. Article 7 (5) provides:

> "Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial."

> Article 7 (6):

> "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and

order his release if the arrest or detention is unlawful. In States parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies."

152. Unique to the Inter-American system is the provision of amparo, which incorporates the habeas corpus right in some cases. Article 25 of the American Convention sets forth the procedural institution of amparo, which is a simple, prompt remedy for protecting all constitutional rights and laws recognized by the State parties and by the Convention.

153. The Inter-American Court of Human Rights decided in 1987 that habeas corpus should be non-derogable. Article 27 of the American Convention on Human Rights permits a State party to derogate from its obligations "in time of war, public danger, or other emergency that threatens the security" of the State party, but only "to the extent and for the period of time strictly required ... provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination ... ." Article 27 explicitly prohibits a State party from suspending 11 articles of the Convention, as well as "the judicial guarantees essential for the protection of such rights".

154. Two Advisory Opinions issued by the Inter-American Court of Human Rights held that habeas corpus and amparo - the legal remedies guaranteed in articles 7 (6) and 25 (1) - may not be suspended, even in emergency situations, because they are among the "judicial guarantees essential" to protect the rights whose suspension article 27 (2) prohibits. (Advisory Opinion of 9 May 1986, Inter-Am. C.H.R., 13 OEA/Ser.L/III.15, doc. 13 (1986) and Advisory Opinion of 6 October 1987, Inter-Am. C.H.R., 13 OEA/Ser.L/V/III.19, doc. 13 (1988). In the first opinion, the Court pointed out that habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret, and in protecting against torture or other cruel, inhuman, or degrading punishment or treatment. The Court buttressed this conclusion by reference to bitter realities in recent decades, particularly disappearances, torture, and murder committed or tolerated by some Governments. Such experience has demonstrated that the right to life and to humane treatment are threatened whenever the right to habeas corpus is partially or wholly suspended.

155. In finding that habeas corpus is an essential judicial guarantee of the non-derogable rights enumerated in article 27, and therefore is itself non-derogable, the Court cited the special role that habeas corpus plays in any system governed by the rule of law. The "suspension of guarantees" under article 27 does not imply a temporary suspension of the rule of law. Even in a state of emergency, when guarantees are suspended, a Government does not acquire absolute powers that go beyond the circumstances justifying the state of emergency.

156. The Court also linked habeas corpus to the "effective exercise of representative democracy" referred to in article 3 of the OAS Charter. Any suspension of guarantees under article 27 lacks all legitimacy whenever it is resorted to for the purpose of undermining the democratic system. In the context of a democratic system, habeas corpus is essential to protect the non-derogable rights and freedoms listed in article 27 and therefore may not be suspended.

157. In its second Advisory Opinion, the Inter-American Court stated that the "essential" judicial guarantees that are not subject to derogation according to article 27 include habeas corpus, amparo, and any other effective remedy before judges or competent tribunals which is designed to guarantee respect for the rights and freedoms whose suspension are not authorized by the American Convention. The Court also stated that the judicial guarantees should be exercised within the framework and the principles of due process of law expressed in article 8. Furthermore, the Court emphasized that the judicial nature of the guarantees implies "the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency."

158. An effective remedy in the nature of habeas corpus can also be inferred from the African Charter on Human and Peoples' Rights, article 6:

> "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

Similarly, article 7 (1) (a) can be read to provide relief against violations of fundamental rights, such as liberty:

> "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force."

159. Although habeas corpus and related procedures for challenging detention were not expressly made non-derogable under article 4 of the International Covenant on Civil and Political Rights, habeas corpus/amparo should now be seen as non-derogable. Without the ability to challenge the legality of one's detention, especially in times of public emergency, one will never be guaranteed of receiving a fair trial. For this very reason, it is essential that the draft third optional protocol to the International Covenant on Civil and Political Rights be adopted. This optional protocol, if adopted, would make the provisions of the International Covenant on Civil and Political Rights guaranteeing a fair trial and a remedy non-derogable in all situations. The relevant provisions to be made non-derogable are articles 2 (3), 9 (3), and 9 (4) of the International Covenant on Civil and Political Rights. Only upon adoption and ratification of the optional protocol will the right to a fair trial and a remedy be effectively protected and made available to everyone.

VII. CONCLUSIONS AND RECOMMENDATIONS

160. The Special Rapporteurs have reviewed the treaties and other international instruments protecting the right to a fair trial and a remedy. They have studied the interpretations of the right by the Human Rights Committee, the African Commission on Human and Peoples' Rights, the European Commission and Court of Human Rights, and the Inter-American Commission on and Court of Human Rights. They have also prepared a study of the right to habeas corpus, amparo, and similar procedures.

161. The Special Rapporteurs have gathered materials about national constitutions, laws, rules, and practices relating to the right to a fair trial from more than 65 nations. In this regard, they have very much appreciated the information they have received from Governments, as well as intergovernmental organizations, non-governmental organizations, bar associations, and individuals.

162. The Special Rapporteurs have found that several of the States studied appear to operate dual systems of trial procedures. Some States deviated from standard procedures in emergency situations which threaten national security or when the offence is political in nature. In some States, jurisdiction is lodged in special or military courts, while in others regular criminal courts try the cases but with remarkable deviation from the State's fair trial norms. While these problems do not exist in many countries, the problems indicate the need for greater international protection for the right to a fair trial and a remedy - particularly during periods of public emergency.

A. Publication and dissemination of the study

163. The Special Rapporteurs view each preparatory, preliminary, and progress report in this study as not only an update of the previous report, but also as a separate chapter in the entire study, each focusing on particular aspects of the right to a fair trial and a remedy. In order to avoid unnecessary repetition of the earlier chapters and to produce a relatively compact document for the Sub-Commission, they have chosen not to assemble all the chapters into their final report which would have been quite lengthy. Instead, the Special Rapporteurs recommend that the entire study be compiled in one document to be published under the United Nations Study Series. In preparation for publication by the United Nations, the Special Rapporteurs will undertake, without financial implications, to compile the full study with all its chapters in light of the comments received from Governments, Sub-Commission members and others, as well as the most recent developments up to the date on which the report is ready for publication. This comprehensive document will provide an invaluable source of fair trial norms and remedies, interpretations of those norms, areas where the right can be strengthened, and recommendations to Governments, non-governmental organizations and individual judges, lawyers and lay people of how to implement and protect the basic human right to a fair trial and a remedy. In order to best appreciate this study, it should be published as one comprehensive document which would be translated and be given broad dissemination. The published report should be particularly useful to the International Law Commission in its efforts to draft a statute for an International Criminal Tribunal and to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International

Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991. It should also be submitted to the Governments, intergovernmental organizations, non-governmental organizations, bar associations and individuals that provided information for this study. In addition, the United Nations should encourage book reviews about the published study on the right to a fair trial and a remedy, so as to disseminate its contents. (Indeed, all United Nations studies should be the subject of such book reviews.)

164. The outline for the final United Nations publication is as follows:

Study on the Right to a Fair Trial and a Remedy: Current Recognition and Measures Necessary for its Strengthening

I. Introduction

A. Authorization of the study

B. Need for the study

C. How the study was prepared

II. Treaties and Other Standards on the Right to a Fair Trial and a Remedy

A. Introduction

B. United Nations-based standards

1. Universal Declaration of Human Rights

2. International Covenant on Civil and Political Rights

(a) General comments

(b) Interpretations by the Human Rights Committee

(c) Comments on States parties' reports

3. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

4. Convention on the Elimination of All Forms of Racial Discrimination

(a) Decisions of CERD

5. Other United Nations standards

(a) Basic Principles on the Independence of the Judiciary

(b) Guidelines on the Role of Prosecutors

(c) Basic Principles on the Role of Lawyers

(d) Code of Conduct for Law Enforcement Officials

(e) Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

(f) Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

(g) Standard Minimum Rules for the Treatment of Prisoners

(h) Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

(i) Safeguards guaranteeing protection of the rights of those facing the death penalty

(j) Declaration on the Protection of All Persons from Enforced Disappearance

(k) United Nations Rules for the Protection of Juveniles Deprived of their Liberty

(l) United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")

(m) United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)

(n) United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)

(o) Convention and Protocol relating to the Status of Refugees

C. African Charter on Human and Peoples' Rights

1. Declaration of Fair Trial

D. [European] Convention for the Protection of Human Rights and Fundamental Freedoms

1. Interpretations of the Commission of Human Rights

2. Interpretations of the European Court of Human Rights

(a) Civil rights and obligations

(b) Criminal charges

E. Inter-American Standards

1. Inter-American Convention on Human Rights

2. American Declaration on the Rights and Duties of Man

3. Interpretations by the Inter-American Court of Human Rights

4. Interpretations by the Inter-American Commission on Human Rights

F. Humanitarian law standards

G. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

H. International Law Commission Draft Statute for an International Criminal Tribunal

I. Nürnburg and Tokyo Tribunals

J. International Labour Organisation standards and interpretations

K. Standards under the Conference on Security and Cooperation in Europe (CSCE)

L. Other standards

M. General observations

III. Standards in All Adjudicative Proceedings

A. Introduction

B. Notice

C. Fair hearing

D. Public hearing

E. Independent and impartial tribunal

F. Methods of conducting a trial

G. Approaches to the submission and evaluation of evidence

H. Interpreter

I. Counsel

J. Adequate time and facilities for the defence

K. Witnesses

L. Appeal

M. Remedy

IV. Further Standards in Criminal Cases

A. Introduction

B. Notice

1. Right to be informed promptly of charges

2. Rights related to the bringing of charges

C. Presumption of innocence

D. Right to humane treatment during detention

E. Right to release pending trial

F. Methods of conducting a trial

1. Right to a trial without undue delay

2. Right to be tried by an independent and impartial tribunal

G. Right to defend himself/herself

H. Counsel

1. Right to free, effective legal representation

2. Right to communicate with counsel and have adequate time and facilities for the preparation of the defence

I. Right to free assistance of an interpreter

J. Rights during trial

K. Right not to be held guilty of any criminal offence for an act or omission not constituting a criminal offence

L. Right to an appeal

M. Right not to be tried again for the same offence

N. Juvenile procedures

V. Right to a Remedy; Amparo and Habeas Corpus

A. Introduction

B. Amparo

C. Habeas corpus

VI. Right to a Fair Trial and a Remedy as a Non-Derogable Right

VII. Recommendations: Strengthening the Right to a Fair Trial and a Remedy

Appendices:

A. Draft third optional protocol to the International Covenant on Civil and Political Rights, aiming at guaranteeing under all circumstances the right to a fair trial and a remedy

B. Compilation of international instruments and documents relating to the right to a fair trial and a remedy

C. Body of principles

D. Methodology of study

E. Questionnaire

F. Bibliography

B. Draft third optional protocol

165. In order to provide greater protection to the right to a fair trial and a remedy during periods of public emergency, the Special Rapporteurs recommend the development of a third optional protocol to the International Covenant on Civil and Political Rights, aiming at guaranteeing under all circumstances the right to a fair trial and a remedy. The Special Rapporteurs have prepared a revised draft of such a third optional protocol, which is contained in annex I to this final report. As discussed in paragraph 29 above, there is no need to precede the draft third optional protocol with a declaration. Although it is customary to precede a convention with a declaration, it is not necessary to precede a protocol with a declaration. None the less, the Special Rapporteurs believe that the Sub-Commission should consider drafting a separate declaration on the right to habeas corpus, amparo, and similar procedures. Such a declaration could amplify and further define the international meaning of the right to habeas corpus, amparo, and similar procedures. The drafting of that declaration could proceed in the Sub-Commission at the same time that the already drafted third optional protocol on the right to a fair trial and a remedy is being considered by the Commission.

166. The draft third optional protocol makes non-derogable in periods of public emergency both the right to a fair trial and the right to a remedy. The Special Rapporteurs recommend that the right to a fair trial and the right to a remedy be included within the third optional protocol, because these two rights are very much related. During the past several years, the Commission on Human Rights and the Sub-Commission have reiterated their view that the right to habeas corpus or similar procedures should be made non-derogable and thus should be applicable even during periods of public emergency. The International Covenant on Civil and Political Rights does not specifically guarantee the right to habeas corpus or amparo, because those precise procedures are not available in some countries. None the less, the Covenant in articles 2 (3), 9 (3) and 9 (4) provide the essential remedy for violations

of human rights available through habeas corpus, amparo, or similar procedures. Accordingly, the Special Rapporteurs recommend that the draft third optional protocol make non-derogable not only the right to a fair trial guaranteed by article 14 of the Civil and Political Covenant, but also articles 2 (3), 9 (3) and 9 (4).

167. The Special Rapporteurs recommend that this final report, including particularly the third optional protocol in annex I, be sent to all Governments and non-governmental organizations for their comments, so that their comments can be considered by the Commission. The previous draft was sent to Governments and non-governmental organizations in 1993, and the optional protocol was revised in the light of the comments received. It would be useful to send the revised draft for further comments. Also, the draft should be submitted for technical review before the drafting process begins in the Commission on Human Rights.

168. Pursuant to its decision 1994/107, the Commission expects to consider the Special Rapporteurs' recommendations on the third optional protocol at its fifty-first session in 1995. The Special Rapporteurs recommend that the Commission establish an open-ended working group to complete the drafting of the third optional protocol. There exist already, however, a number of open-ended working groups established by the Commission including the working group preparing the draft declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms (also known as the declaration on human rights defenders), the working group drafting the optional protocol to the Convention against Torture, the two working groups drafting protocols to the Convention on the Rights of the Child, and the inter-sessional working group on the organization of the work of the Commission session. In addition, it is expected that the Commission at its fifty-first session will want to establish a new working group to draft a declaration on indigenous rights. Further, the Commission may be asked to consider draft principles on human rights and a healthy environment. Consequently, there exists a real danger of an administrative overload for both the United Nations and the Governments which need to participate in these groups. The Special Rapporteurs believe that a queuing system should be established by the Commission to alleviate this potential overburden of United Nations and government resources. Accordingly, the Special Rapporteurs recommend that the Commission establish the open-ended working group on the draft third optional protocol at such time as one of the present open-ended working groups has completed its drafting efforts. It is understood that the working group on the third optional protocol will not, therefore, begin drafting until after the Commission's fifty-second session or a year or so later. This delay will provide time for the Commission to solicit more comments on the draft third optional protocol and to obtain a technical review of the present draft.

C. Draft body of principles

169. The Special Rapporteurs have also sought to derive from international interpretations of the right to a fair trial and a remedy as well as from national laws and practices those common elements which might serve as the basis for a Body of Principles on the Right to a Fair Trial and a Remedy.

Bodies of principles or declarations are valuable when developing new international standards, such as the United Nations Declaration on the Protection of All Persons from Enforced Disappearance, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the Guidelines on the Role of Prosecutors and the Basic Principles on the Role of Lawyers. They may also have some value when attempting to improve an interpretation by a treaty body of ill-defined or inadequately defined rights in a regional instrument, such as the resolution on the right to a fair trial adopted by the African Commission on Human and Peoples' Rights. When a body of principles or declaration attempts to summarize a voluminous, well-developed, complex and rapidly changing area of law and standards, such as the right to a fair trial, however, it is questionable whether the formulation of a declaration is advisable for an intergovernmental organization. Such codifications or restatements risk overlooking subtleties and long-established interpretations. Rewording inevitably gives rise to questions whether a different meaning is intended. The draft body of principles contained in annex II simply restates and clarifies existing international fair trial norms and interpretations; it is not expected to serve as the basis for the Sub-Commission, the Commission, or the General Assembly to draft a new norm-setting declaration; and it should in no way weaken present fair trial standards.

170. Accordingly, the Special Rapporteurs have prepared the draft body of principles on the right to a fair trial and a remedy, which is contained in annex II to this final progress report. The Special Rapporteurs encourage the Sub-Commission to view this draft body of principles as a succinct summary of the materials and interpretations collected in this study.

171. Since most of the information gathered by the Special Rapporteurs related to criminal trials, the study focuses principally, but not exclusively, on trial procedures in such cases. The Special Rapporteurs have been able to gather sufficient material to provide a basis for drafting a body of principles relating to all aspects of the right to a fair trial and a remedy, including administrative, civil, and criminal proceedings. None the less, the Special Rapporteurs recommend that further study of administrative, civil, and other procedures should be undertaken. The massive volume of the material already collected by the Special Rapporteurs, however, indicates that such additional study should be considered separately by the Sub-Commission at some later time.

D. Working Group on Arbitrary Detention and other mechanisms for implementation

172. The Special Rapporteurs are encouraged by the efforts of the Working Group on Arbitrary Detention which has for two years rendered decisions in regard to communications which had been submitted. The Working Group has considered several communications which stated that a person had been imprisoned without a trial or after a trial failing to comply with international fair trial standards. Accordingly, the Working Group determined whether procedures followed in particular cases violated international norms with respect to the right to a fair trial and could thus be considered to be "arbitrary" within its mandate. The Special Rapporteurs believe that the Working Group on Arbitrary Detention possesses great potential for implementing the right to a fair trial and a remedy in specific cases.

173. The Working Group on Arbitrary Detention can determine in an expeditious manner whether individuals have been afforded their right to a fair trial and a remedy in the context of administrative detention or criminal prosecution. The Working Group cannot, however, respond to problems of unfair trials in cases which do not result in detention. None the less, the Working Group can respond more promptly to cases of arbitrary detention and thus can supplement the work of the Human Rights Committee, the Inter-American Commission on and Court of Human Rights, the European Commission and Court of Human Rights, and eventually the African Commission on Human and Peoples' Rights. Those latter institutions may consider all fair trial issues - whether civil, criminal, military, or administrative - but only in regard to Governments that have ratified their authorizing treaties and instruments. In that regard, the Working Group on Arbitrary Detention can respond effectively to violations in all countries of the world. Similarly, by its resolution 1994/41 of 4 March 1994, the Commission on Human Rights established the Special Rapporteur on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, which can respond effectively to certain issues relevant to the right to a fair trial and a remedy.

E. Other recommendations for strengthening the right to a fair trial and a remedy

174. Pursuant to the Sub-Commission's resolutions 1992/21 of 27 August 1992 and 1993/26 of 25 August 1993, in which this final report was anticipated, the Special Rapporteurs make the following additional recommendations, aimed at Governments and international organizations, for strengthening the implementation of the right to a fair trial and a remedy.

175. It should be noted at the outset that the Special Rapporteurs recognize that it is very difficult to identify globally applicable methods for strengthening the right to a fair trial and a remedy. None the less, there exist nine pragmatic steps to strengthen the implementation of the right which could be pursued to assure that it is strengthened. Those steps are discussed more fully in the paragraphs below, but could be summarized as follows:

(a) The Government should assure that its constitution, laws, rules, and other written procedural norms comport with international instruments and prevailing international interpretations guaranteeing the right to a fair trial and a remedy;

(b) The Government should provide or facilitate the training of its judges, lay assessors, other decision makers, court administrators, prosecutors, lawyers, law enforcement officers, prison officials, and other personnel involved in the administration of justice, so as to assure that they are fully qualified to protect the right to a fair trial and a remedy. The training should include the principles of national and international law protecting the right to a fair trial and a remedy;

(c) The Government should assure the independence of the judges, lay assessors, other decision makers, prosecutors, and lawyers, so they can protect the right to a fair trial and remedy and can play their appropriate role in the administration of justice. In particular, Governments should take

steps to comply with the Basic Principles on the Independence of the Judiciary, the Guidelines on the Role of Prosecutors, the Basic Principles on the Role of Lawyers, and related United Nations standards;

(d) The Government should assure that its legal provisions guaranteeing the right to fair trial and a remedy are applied in practice in criminal, civil, administrative, and other proceedings at all times, including during any states of emergency;

(e) The Government should establish adequate mechanisms for assuring that national and international provisions guaranteeing the right to a fair trial and a remedy are applied in practice. Among the mechanisms which the Government should use to assure the implementation of the right to a fair trial and a remedy are: appeal or similar review in higher courts or tribunals; habeas corpus, amparo or similar procedures; ombudsmen and independent oversight mechanisms; national and local human rights institutions; etc.;

(f) The Government should ratify those treaties which contain provisions protecting the right to a fair trial and a remedy, including, for example, the International Covenant on Civil and Political Rights and relevant regional human rights treaties. Similarly, the Government should ratify the first Optional Protocol to the International Covenant on Civil and Political Rights and participate in the relevant optional review mechanisms in the human rights treaties;

(g) The Government should adopt and ratify a third optional protocol to the International Covenant on Civil and Political Rights, aiming at guaranteeing under all circumstances the right to a fair trial and a remedy (annex I);

(h) The Government should cooperate with international mechanisms which have been established to monitor compliance with the right to a fair trial and a remedy, including the Human Rights Committee; the relevant regional human rights bodies; the Working Group on Arbitrary Detention; the Special Rapporteur on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers; international trial observers sent by intergovernmental organizations, Governments and non-governmental organizations; etc.;

(i) The Government should consider seeking advisory services and technical assistance from the United Nations, other intergovernmental organizations and non-governmental organizations to assist with the drafting of national laws and procedures so as to comply with international standards on the right to a fair trial and a remedy; with establishing national and local mechanisms for assuring compliance with national laws and international standards relating to the right to a fair trial and a remedy; and with training of judges, prosecutors, lawyers and other personnel in standards, procedures and practices necessary to protect the right to a fair trial and a remedy.

176. The most fundamental aspect of guaranteeing and strengthening the right to a fair trial and a remedy on the domestic level is to have adequate written

procedures and laws which comport with articles 2 (3), 9 (3), 9 (4) and 14 of the International Covenant on Civil and Political Rights as well as the other instruments and international interpretations of the right to a fair trial and a remedy. Various provisions guaranteeing the right to a fair trial and a remedy may exist in a country's constitution, statutory laws, or other procedural rules. Hence, the first step in guaranteeing and strengthening the right to a fair trial and a remedy would be to review those written rules and procedures to assure that they comport with international standards. For instance, are there established written procedures guaranteeing the right to a fair trial for criminal proceedings as well as similar laws and procedures applicable to administrative and civil proceedings?

177. In addition to ensuring adequate laws and procedures to guarantee and strengthen the right to a fair trial and a remedy, there is an equally pressing need for adequate personnel to implement the laws and procedures. Judges, court administrators, prosecutors, lawyers, lay assessors, law enforcement personnel and prison officials need to receive the highest level of training available with a special emphasis on the procedures necessary to protect the right to a fair trial and a remedy not only in the courtroom, but throughout the entire judicial process, be it civil, criminal or administrative. After all, the right to a fair trial means little if the persons responsible for protecting that right are unable or unwilling to understand the mechanisms necessary to implement the right. Ideally, all decision makers should be trained as lawyers but where that is not possible or practicable, they should receive as much training as possible with a special emphasis on fair trial procedures. Once again, the Special Rapporteurs recognize that training needs to be adjusted to conform with the legal traditions of the individual countries. In those countries where training is inadequate or unavailable, technical assistance might be appropriate to ensure at the very least the minimum level of competency of the judiciary and the legal profession.

178. Another important component necessary to strengthen the concrete implementation of the right to a fair trial and a remedy is to guarantee the independence of the judiciary from undue influence. Governments should take steps to comply with the Basic Principles on the Independence of the Judiciary, the Guidelines on the Role of Prosecutors, and the Basic Principles on the Role of Lawyers. These instruments contain provisions guaranteeing that judges, prosecutors, and lawyers are allowed to perform their essential duties without intimidation, hindrance, harassment, or improper influence. The Special Rapporteurs are especially encouraged by the establishment of the Special Rapporteur on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, who will be able to act effectively in regard to certain aspects of the right to a fair trial and a remedy, that is, particularly in cases relating to the independence of judges and lawyers.

179. Closely related to adequate laws and procedures designed to protect the right to a fair trial and a remedy and the competence of the individuals responsible for implementation of these laws is the degree to which those laws are implemented. There needs to be domestic implementation of these laws and procedures at every level of proceedings and in every context where the right to a fair trial and a remedy exists, even during states of emergency. The

Special Rapporteurs recommend that the right to a fair trial and a remedy be thoroughly implemented in every context at the domestic level in order to protect more fully and strengthen the right.

180. After identifying the laws and procedures necessary to protect the right to a fair trial and a remedy, the requisite level of training for those individuals responsible for implementing the right, and the necessary degree of domestic implementation of the right, there still exists the need for mechanisms to monitor the implementation of the right. These mechanisms include adequate appeal procedures or other forms of revision, the availability of remedies such as habeas corpus and other similar procedures, and the creation of an ombudsman to receive and respond to complaints regarding deprivation of the right to a fair trial and a remedy. These mechanisms can safeguard the right and adequately check those individuals responsible for implementing the right to ensure that they are satisfactorily complying with their duties. For those countries unable to develop their own internal safeguards, technical assistance such as country visits might be appropriate to help monitor the basic principles necessary to guarantee the right to a fair trial and a remedy.

181. The Government should ratify those treaties which contain provisions protecting the right to a fair trial and a remedy, including, for example, the International Covenant on Civil and Political Rights and relevant regional human rights treaties.

182. Notwithstanding the aforementioned recommendations, the necessary domestic laws and procedures may not exist or may prove to be inadequate to protect the right to a fair trial and a remedy. In those situations, Governments may need technical assistance to draft the appropriate legislation. Model legislation could be drafted to provide the basic laws and procedures necessary for guaranteeing and strengthening the right to a fair trial and a remedy. It should be noted, however, that there are many ways to achieve the basic international standards of this right; none the less, if model legislation is drafted, it may need to be adjusted to accompany the different judicial traditions throughout the world such as the Civil Law, Islamic Law, and Common Law. There exists a pressing need for adequate substantive laws as well, because courts cannot function absent substantive laws. In many countries, substantive laws are lacking with respect to civil and administrative areas.

183. In addition to implementation of the right to a fair trial and a remedy at the domestic level, the Special Rapporteurs recommend that international monitoring of the right continue through such bodies as the Human Rights Committee, the Working Group on Arbitrary Detention, the Special Rapporteur on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, the European Commission and Court of Human Rights, the Inter-American Commission on and Court of Human Rights, the African Commission on Human and Peoples' Rights and international trial observers sent by intergovernmental organizations, Governments and non-governmental organizations. These mechanisms have already played an invaluable role in identifying and protecting the right to a fair trial and a remedy and their continued involvement is necessary to achieve the optimal level of implementation of the right throughout the world.

F. Conclusion

184. In conclusion, the two Special Rapporteurs note that the task they have undertaken covers a vast and complex subject. The right to a fair trial and a remedy has a greater importance today than it had when the Special Rapporteurs began their work. Many Governments are taking a fresh look at how they can develop institutions which will provide enduring protection for human rights. Governments should recognize that judicial and administrative structures necessary to guarantee the right to a fair trial and a remedy are indispensable for the protection of all other human rights. The two Special Rapporteurs wish to express their appreciation for the cooperation and assistance they have received from Governments, the Centre for Human Rights, non-governmental organizations, and from the many others who have assisted with this study. The Special Rapporteurs would like to underscore the spirit of cooperation which has reigned between them throughout their period of collaboration on the study and view this spirit of cooperation as a triumph over the political and ideological competition of the cold war years in which this study was begun as well as a harbinger of continuing cooperation between their respective nations and all other countries.

ANNEXES

Annex I

DRAFT THIRD OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, AIMING AT GUARANTEEING UNDER ALL CIRCUMSTANCES THE RIGHT TO A FAIR TRIAL AND A REMEDY

Elaboration of a third optional protocol to the International Covenant on Civil and Political Rights, aiming at guaranteeing under all circumstances the right to a fair trial and a remedy

The General Assembly,

Recalling articles 8, 10 and 11 of the Universal Declaration of Human Rights, adopted in its resolution 217 A (III) of 10 December 1948, which affirm the right of every individual to a fair and public hearing by an independent and impartial tribunal, the right to be presumed innocent until proven guilty and the right to an effective remedy,

Recalling also article 14 of the International Covenant on Civil and Political Rights, adopted in its resolution 2200 A (XXI) of 16 December 1966, which reaffirms the right of every individual to a fair and public hearing,

Recalling further articles 9.3 and 9.4 of the International Covenant on Civil and Political Rights which require States Parties to that Convention to ensure that an arrested or detained person is brought promptly before a judge or similar officer and provide that anyone who is deprived of liberty is entitled to take proceedings before a court in order that the court may without delay determine the lawfulness of the detention and order release if the detention is not lawful,

Recalling in addition article 2.3 of the International Covenant on Civil and Political Rights and article 8 of the Universal Declaration of Human Rights, which assure the right to an effective remedy for violations of human rights,

Noting that the fair trial provisions in articles 5, 6, 7 and 26 of the African Charter on Human and Peoples' Rights are non-derogable,

Noting also that the "judicial guarantees for the protection of [the rights made non-derogable by article 27]" of the American Convention on Human Rights are also non-derogable,

Noting further the guarantees of a fair trial and a remedy incorporated in articles 5, 7, 12, 13 and 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Noting that articles 96 and 99 to 108 of the Geneva Convention (III) relative to the Treatment of Prisoners of War prescribe the rights of prisoners of war in judicial proceedings; and that articles 54, 64 to 74, and 117 to 126 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War provide for the right to a fair trial

and a remedy in occupied territories, and extend fair trial guarantees in international armed conflicts to all persons, including those arrested for actions relating to the conflict,

Noting also that common article 3 of the four Geneva Conventions relative to the protection of victims of armed conflicts and article 6 of Additional Protocol II to the Geneva Conventions contain indispensable judicial guarantees for the protection of the right to a fair trial during non-international armed conflicts,

Aware of the Standard Minimum Rules for the Treatment of Prisoners, the Basic Principles on the Independence of the Judiciary, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the Basic Principles on the Role of Lawyers, and the Guidelines on the Role of Prosecutors, which are intended to apply at all times,

Having examined the preparatory report (E/CN.4/Sub.2/1990/34), the preliminary report E/CN.4/Sub.2/1991/29), the progress reports (E/CN.4/Sub.2/1992/24 and Add.1-3, and E/CN.4/Sub.2/1993/24 and Add.1-3) and the final report (E/CN.4/Sub.2/1994/24 and Add.1) submitted by the Special Rapporteurs,

Mindful of its resolution 41/120 of 4 December 1986 on the setting of international standards in the field of human rights,

Wishing to give States parties to the International Covenant on Civil and Political Rights that choose to do so the opportunity to become parties to a third optional protocol to that convention,

Adopts the third optional protocol to the International Covenant on Civil and Political Rights,

Third Optional Protocol to the International Covenant on Civil and Political Rights, aiming at guaranteeing under all circumstances the right to a fair trial and a remedy

The States Parties to the present Protocol,

Guided by articles 8, 10 and 11 of the Universal Declaration of Human Rights, which affirm the right of every individual to a fair and public hearing by an impartial tribunal and an effective remedy,

Recalling articles 2.3, 9.3, 9.4 and 14 of the International Covenant on Civil and Political Rights,

Concerned that the right to a fair trial and a remedy may be most threatened during a time of public emergency,

Desiring to undertake an international commitment to protect in all circumstances the right to a fair trial and a remedy by adding articles 2.3, 9.3, 9.4 and 14 to the rights which are non-derogable under article 4 of the International Covenant on Civil and Political Rights,

Have agreed as follows:

Article 1

No derogation from articles 2.3, 9.3, 9.4 or 14 of the International Covenant on Civil and Political Rights may be made under the provisions of article 4 of the Covenant.

Article 2

No reservation is admissible to the present Protocol.

Article 3

The States Parties to the present Protocol shall include in the reports they submit to the Human Rights Committee, in accordance with article 40 of the Covenant, information on the measures that they have adopted to give effect to the present Protocol.

Article 4

With respect to the States Parties to the Covenant that have made a declaration under article 41, the competence of the Human Rights Committee to receive and consider communications when a State Party claims that another State Party is not fulfilling its obligations shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 5

With respect to the States Parties to the first Optional Protocol to the International Covenant on Civil and Political Rights adopted on 16 December 1966, the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction shall extend to the provisions of the present Protocol.

Article 6

The provisions of the present Protocol shall apply as additional provisions to the Covenant.

Article 7

1. The present Protocol is open for signature by any State that has signed the Covenant.

2. The present Protocol is subject to ratification by any State that has ratified the Covenant or acceded to it. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State that has ratified the Covenant or acceded to it.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 8

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

Article 9

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 10

The Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph 1, of the Covenant of the following:

(a) Statements made under article 4 of the present Protocol;

(b) Signatures, ratifications and accessions under article 7 of the present Protocol;

(c) The date of entry into force of the present Protocol under article 8 thereof.

Article 11

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 48 of the Covenant.

Annex II

DRAFT BODY OF PRINCIPLES ON THE RIGHT TO A FAIR TRIAL AND A REMEDY

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Introduction

1. The Special Rapporteurs have reviewed treaties and other international instruments protecting the right to a fair trial. They have studied interpretations of the right to a fair trial by the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the African Commission on Human and Peoples' Rights, the European Commission and Court of Human Rights, and the Inter-American Commission on and Court of Human Rights. They have also prepared a study of the right to habeas corpus, amparo, and similar procedures.

2. In addition, the Special Rapporteurs have gathered materials about national constitutions, laws, rules and practices relating to the right to a fair trial and a remedy from more than 65 countries. In this regard, they have very much appreciated the information they have received from 36 Governments, as well as from intergovernmental organizations, non-governmental organizations, bar associations and individuals.

3. In its resolutions 1992/21 of 27 August 1992 and 1993/26 of 25 August 1993, the Sub-Commission anticipated the preparation by the Special Rapporteurs of this final report, containing recommendations for strengthening the implementation of the right to a fair trial in the light of interpretations of the right by international bodies and contemporary national practices.

4. The Special Rapporteurs have sought to derive from international interpretations of the right to a fair trial and a remedy, as well as from national laws and practices, those common elements which might serve as the basis for a draft body of principles on the right to a fair trial and a remedy. Accordingly, the Special Rapporteurs have prepared a draft Body of Principles on the Right to a Fair Trial and a Remedy, which is contained in this annex II to the present report. In this regard the Special Rapporteurs have sought to ensure that the present fair trial standards in existing international law are not weakened in the process of elaborating and delineating the draft body of principles.

5. In order to provide a relatively succinct summary of the norms identified by the Special Rapporteurs, they submit the following draft body of principles on the right to a fair trial and a remedy.

DRAFT BODY OF PRINCIPLES ON THE RIGHT TO A FAIR TRIAL AND A REMEDY

Provisions applicable to all adjudicative proceedings 1/

1. In the determination of any criminal charge against a person, or of the person's rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Any judgement rendered in a criminal case or in

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1/ For definitions of terms in this section and elsewhere in the draft body of principles, see "Use of terms", para. 74 below.

a suit at law shall be made public, except where the interests of juvenile persons otherwise require or the proceedings concern matrimonial disputes or the guardianship of children.

Fair hearing

2. A "fair ... hearing" requires respect for the principle of equality of arms between parties to the proceedings, whether they be civil, criminal, administrative or military.

3. All persons shall be equal before the courts and tribunals. The right of every individual to a fair trial is recognized without any distinction whatsoever as regards race, colour, sex, language, religion, political or other convictions, national or social origin, means or other circumstance.

4. If a person's rights and obligations may be adversely affected in a suit at law or by particularized actions or inactions taken or proposed by a public authority, the court or the public authority shall give the person adequate notice of the nature and purpose of the proceedings and shall give the person a fair and public hearing by a competent, independent and impartial tribunal established by law.

5. A fair hearing requires that a person entitled to adequate notice of the nature and purpose of proceedings shall have the right to:

(a) Be afforded an adequate opportunity to prepare a case;

(b) Present arguments and evidence, and to meet opposing arguments and evidence, either in writing, orally or by both means;

(c) Consult and be represented by counsel or other qualified persons of his or her choice during all stages of the proceedings;

(d) Consult an interpreter during all stages of the proceedings, if he or she cannot understand or speak the language used in the court or tribunal;

(e) Have his or her rights and obligations affected only by a decision based solely on evidence known to parties to public proceedings;

(f) Have his or her rights and obligations affected only by a decision rendered without undue delay and as to which the parties are provided adequate notice thereof and the reasons therefor;

(i) Factors relevant to what constitutes undue delay include: the complexity of the case, the conduct of the parties, the conduct of other relevant participants, whether an individual is detained pending proceedings, and the interest of the persons in the proceeding.

(g) Appeal decisions to a higher administrative authority, a judicial tribunal, or both.

Public hearing

6. In order to hold a "public hearing", the court or tribunal shall make information about the time and venue of the public hearing available, and provide adequate facilities for attendance by interested members of the public.

7. In a public hearing, the court or tribunal may not limit attendance to only a particular category of people and should allow local, national and international observers to attend, so as to verify that justice is done and seen to be done. Representatives of the press and of other media may be present at a public hearing.

8. Exceptions to a public hearing shall be narrowly construed. In regard to each exception, the tribunal shall determine whether the strong public and individual interest in seeing that justice is done would be substantially outweighed by the rationale for the exception which is proposed for closure from public attendance. If some degree of closure is found to be justified as an exception, the tribunal should also consider closing only portions of the proceedings or should consider taking evidence in camera so as to implement to the greatest extent possible the right to a public hearing.

9. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society; when the interest of the private lives of the parties so requires; or to the extent strictly necessary in the opinion of the court or tribunal in special circumstances where publicity would prejudice the interests of justice.

10. To define further these exceptions to the right to a public hearing: the public may be excluded from hearings on the grounds of morals, where the testimony will have such a corrupting or intimidating influence on the observers or participants as to outweigh the strong public and individual interest in a public hearing. Moral grounds for excluding the public may be asserted primarily in the trial of cases involving sexual offences. The public may be excluded from hearings on the grounds of a grave threat to public order; such a threat may outweigh the strong public and individual interest in a public hearing for cases of disciplinary proceedings in prisons. The public may be excluded from hearings because of national security concerns when hearings involve state defence secrets in a democratic society. Privacy interests may merit excluding the public from hearings relating to family issues, such as divorce and guardianship, and from juvenile proceedings involving sexual offences, in so far as public proceedings would constitute a clearly unwarranted invasion of personal privacy outweighing the strong public and individual interest in a public hearing.

11. A public hearing shall occur where the merits of the case are being examined - either at the trial or appellate level, but not necessarily at both levels.

12. An individual party may waive his or her right to a public hearing if consent is given freely, if it is given in an unequivocal manner and preferably in writing, and if it does not infringe any important public interest in seeing that justice is done.

Independent tribunal

13. Every person has the right to a fair hearing of his or her case by a legally constituted competent, independent and impartial court or tribunal.

14. In order to be "independent", a tribunal shall be established by law to have adjudicative functions to determine matters within its competence on the basis of rules of law and in accordance with proceedings conducted in a prescribed manner. A tribunal may be established by legislative, executive, or judicial power.

15. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for decision is within the tribunal's competence as defined by law.

16. A tribunal's jurisdiction may be determined, inter alia, by considering where the events involved in the dispute or offence took place, where the property in dispute is located, the place of residence or domicile of the parties, and the consent of the parties.

17. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

18. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This provision is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences by the judiciary, in accordance with the law.

19. A court shall be independent from the executive branch. The executive branch in a State shall not be able to interfere in a court's proceedings and a court shall not act as an agent for the executive against an individual citizen.

20. The term of office of judges and members of a tribunal, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

21. Judges or members of a tribunal, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

22. Promotion of judges and members of tribunals, where such a system exists, should be based on objective factors, in particular ability, integrity and experience.

23. It is essential that a judge or member of a tribunal should not be subject to any authority in the performance of his or her duties, aside from duly registered appeals after judgement has been announced.

24. A tribunal shall be independent from the parties in the case.

Impartial tribunal

25. A tribunal shall be "impartial"; it shall base its decision only on objective arguments and evidence presented. The judiciary shall decide matters before them without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason.

26. The impartiality of a tribunal may be subject to challenge if the public is entitled to question, on the basis of ascertainable facts, that the fairness of the judge or tribunal was capable of appearing open to doubt. Three relevant factors should be considered in determining impartiality: whether the trial judge's position allows him or her to play a crucial role in the proceedings; whether the judge may have a preformed opinion which would weigh heavily on the decision-making; and whether a judge would have to rule on an action taken in a prior capacity.

27. A tribunal lacks impartiality if, inter alia, a former public prosecutor or counsel sits as a judge on a case in which he or she prosecuted or served as counsel to a party; a trial judge actively participated in the secret, preparatory investigation of a case; or a judge has some other connection with the case which might bias the decision.

28. In the circumstances identified in the paragraphs just above and in other cases where impartiality appears open to doubt, judges and members of a tribunal have the obligation to recuse themselves.

29. A judge may not consult a higher authority before rendering a decision in order to ensure that his or her decision will be upheld.

Right to a remedy

30. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the rights granted by the constitution, by law, or by the present Body of Principles, notwithstanding that the acts were committed by persons acting in an official capacity.

31. Any person claiming such a remedy shall have such a right determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, which may include judicial remedy.

32. Any person claiming such a remedy shall have the right to have the remedy enforced by competent authorities.

Provisions applicable to arrest and detention

33. Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law.

34. A person may be detained only for probable cause or pursuant to a warrant from a competent authority.

35. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed of any charges against him or her.

36. Anyone who is arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

37. Anyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his or her detention and order release if the detention is not lawful.

(a) Any person arrested or detained has the right to be brought within 24 hours before a judge or authorized judicial officer who shall review the lawfulness of his or her detention and shall order release if the detention is not lawful. The judge or judicial officer shall be authorized by law to exercise judicial power.

(b) Any person arrested or detained shall have prompt access to a lawyer, and in any case not later than 24 hours from the time of arrest or detention. Access to a lawyer includes the attributes of the right to counsel prescribed in the paragraphs below relating to that subject.

38. States shall ensure the right to habeas corpus, amparo or similar procedures. The courts shall at all times hear and act upon petitions for habeas corpus, amparo or similar procedures. No circumstances whatever may be invoked as a justification for denying the right to habeas corpus, amparo or similar procedures.

39. Detention shall be administered by competent authorities established by law and duly identified.

40. Detainees shall be housed in places established by law for that purpose and duly identified.

41. The court with judicial control over the detainee shall be promptly informed that a person has been detained. The court with judicial control over the detainee shall have authority over the officials detaining an individual.

42. The authorities which arrest a person, keep him or her under detention, or investigate the case shall exercise only the powers granted to them under the law, and the exercise of these powers shall be subject to a judicial or other authority.

43. The judiciary shall at all times have authority over executive action resulting in detention.

44. Military courts do not have legal authority over civilians except in narrowly defined circumstances, for example, when the civilian has committed an offence in a military facility.

Right to humane treatment

45. All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person. Persons under any form of detention or imprisonment shall not be subjected to torture or cruel, inhuman or degrading treatment or punishment. In particular, such persons shall not be subjected to the following cruel, inhuman or degrading treatment:

(a) No detainee shall be subjected to incommunicado detention. Communication of the detained or imprisoned person with the outside world shall not be denied for more than a matter of days.

(b) No detainee shall be denied prompt and adequate medical care including necessary medication. No detainee shall be subjected to compulsory medical experimentation.

(c) Accused persons shall be segregated from convicted persons and have the right to separate treatment appropriate to their status as unconvicted persons.

(d) Accused juvenile persons shall be segregated from adults and from juvenile persons whose guilt has been adjudicated. States shall set a minimum age below which a juvenile may not be deprived of his or her liberty.

(e) All detainees have the right to write, send and receive correspondence. Correspondence of detainees with their counsel shall not be delayed, intercepted or censored and shall be in full confidentiality. Other restrictions on correspondence shall not constitute an arbitrary or unlawful interference with the detainee's correspondence.

(f) All detainees have the right to receive visits from counsel, persons assisting counsel, family, friends and others at regular intervals under necessary supervision.

46. All detainees have the right to trial within a reasonable time or release. Pretrial detention is justified only to prevent flight, interference with evidence or the recurrence of crime.

47. Pretrial release may be made subject to guarantees, such as bail, to assure appearance at trial.

Provisions applicable to proceedings relating to criminal charges

Notice

48. Any person charged with a criminal offence shall be informed promptly, in detail, and in a language which he or she understands, of the nature and cause of the charge against him or her.

(a) The accused has the right to be informed as soon as a charge is first made by a competent authority. A person suspected of a crime shall be notified as soon as a court or the prosecution decides to take procedural steps against him or her, or publicly names him or her as a suspect.

(b) The purpose of notice is to inform the accused in a manner that would allow him or her to prepare a defence. The notice shall be provided in time to allow the accused a fair opportunity to examine or have examined the witnesses against him or her and to secure the attendance of witnesses on his or her behalf. The notice shall be provided before the accused is required to make any statement.

(c) The purpose of notice is also to enable a person to take immediate steps to secure his or her release; hence, the notice shall include details of the charges or applicable law and the alleged facts on which the charge is based sufficient to indicate the substance of the complaint against the accused. The arresting authorities shall have sufficient evidence to show that the detention falls within the law on which the charge is based.

(d) The accused has the right to translation of the notice of charges into a language which he or she understands. The notice of charges shall actually be communicated to the accused and not only to a representative or agent; notice in a language understood only by the defence counsel is insufficient.

Right to counsel

49. The accused has the right to defend him or herself in person or through legal assistance of his or her own choosing. Legal representation is regarded as the best means of legal defence against infringements of human rights and fundamental freedoms.

(a) The accused has the right to be informed, if he or she does not have legal assistance, of the right to defend him or herself through legal assistance of his or her own choosing.

(b) This right applies during all stages of any criminal prosecution, including preliminary investigations in which evidence is taken, periods of administrative detention, trial and appeal proceedings.

(c) The accused has the right to choose his or her own counsel freely. This right begins when the accused is first detained or charged. A court may not assign counsel for the accused if a qualified lawyer of the accused's own choosing is available.

Right to free legal assistance

50. The accused has a right to have legal assistance assigned to him or her in any case where the interests of justice so require, and without payment by the accused in any such case if he or she does not have sufficient means to pay for it.

(a) The interests of justice in a particular case should be determined by consideration of the seriousness of the offence of which the defendant is accused and the severity of the sentence which he or she risks.

(b) The interests of justice always require counsel for an accused in any capital case. An accused person in a capital case has the right to choose his or her own legal representative at all stages of the case. An accused person in a capital case may contest the choice of his or her court-appointed lawyer. A prisoner sentenced to death shall have the right to appointed counsel for petition for post-conviction judicial relief, executive clemency, commutation of sentence, amnesty or pardon.

(c) An accused person may not be denied counsel on the ground that he or she has or has had the opportunity to defend him or herself, but does not wish to defend him or herself.

51. An accused person has a right to an effective defence. Lawyers appointed by the court shall provide effective defence counsel.

(a) When legal assistance is provided by the court, the lawyer appointed shall be qualified to represent and defend the accused.

(b) A lawyer appointed by the court to represent and defend the accused shall have the necessary training and experience corresponding to the nature and seriousness of the matter.

(c) When legal assistance is provided by the court, the lawyer shall be free to exercise his or her professional judgement in an independent manner, free of influence from the State or the court.

(d) When legal assistance is provided by the court, the lawyer shall actually advocate in favour of the accused. The lawyer representing the accused may exercise professional judgement in choosing the strategy of the defence.

(e) Lawyers appointed to defend the accused shall be sufficiently compensated to provide an incentive to accord the accused adequate and effective representation.

Right to adequate time and facilities for the preparation of a defence

52. The accused has the right to communicate with counsel and have adequate time and facilities for the preparation of his or her defence.

(a) The accused has a right to see a lawyer during all stages of any criminal proceeding, including any preliminary investigation in which evidence is taken, any period of administrative detention, trial and any appeal.

(b) The accused may not be tried without his or her counsel being notified of the trial date and of the charges in time to allow adequate preparation of a defence.

(c) The accused has a right to adequate time for the preparation of a defence appropriate to the nature of the proceedings and the factual circumstances of the case. Factors which may affect the adequacy of time for preparation of a defence include the complexity of the case, the defendant's access to evidence, the length of time provided by rules of procedure prior to particular proceedings, and prejudice to the defence.

(d) The accused has a right to facilities which assist or may assist the accused in the preparation of his or her defence. The essential elements of the right to adequate facilities are the right to communicate with defence counsel and the right to materials necessary to the preparation of a defence.

(i) All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate with a lawyer, without delay, interception or censorship and in full confidentiality.

(ii) The right to confer privately with one's lawyer and exchange confidential information or instructions is a fundamental part of the preparation of a defence. Facilities shall be provided such that communications with counsel shall be made under circumstances in which the confidentiality of the communications is preserved.

(iii) Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

(iv) The accused or the accused's defence counsel has a right to all relevant information held by the prosecution that could help the accused exonerate him or herself.

(v) It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

(vi) The accused has a right to consult legal materials reasonably necessary for the preparation of his or her defence.

(vii) Before judgement or sentence is rendered, the accused and his or her defence counsel shall have the right to know all the evidence which may be used to support the decision. All evidence submitted must be considered by the court.

(viii) Following a trial and before any appellate proceeding, the accused or the defence counsel has a right to access to (or to consult) the evidence which the court considered in making a decision and the court's reasoning in arriving at the judgement.

The right to an interpreter

53. The accused has the right to the free assistance of an interpreter if he or she cannot understand or speak the language used in court.

(a) The right to an interpreter applies when the accused or a defence witness has difficulty understanding or expressing him or herself in the court's language.

(b) The right to an interpreter does not extend to the right to express oneself in the language of one's choice if the accused or the defence witness is sufficiently proficient in the language of the court.

(c) The right to an interpreter applies to both nationals and aliens.

(d) The right to an interpreter applies at all stages of the proceedings, including pretrial proceedings.

(e) The right to an interpreter applies to written as well as oral proceedings. The right extends to translation or interpretation of all documents or statements necessary for the defendant to understand the proceedings or assist in the preparation of a defence.

(f) The interpretation or translation provided shall be adequate to permit the accused to understand the proceedings and for the tribunal to understand the testimony of the accused or defence witnesses.

(g) The right to interpretation or translation cannot be qualified by a requirement that the accused pay for the costs of an interpreter or translator. Even if the accused is convicted, he or she cannot be required to pay for the costs of interpretation or translation.

Right to trial without undue delay

54. Every person charged with a criminal offence has the right to a trial without undue delay.

(a) The right to a trial without undue delay means the right to a trial which produces a final judgement and, if appropriate, a sentence without undue delay.

(b) In assessing whether there has been undue delay, the period of review of any conviction or sentence shall be included in the assessment.

(c) The right to a trial without undue delay does not depend upon assertion of that right by the accused. The accused is not required to demand a trial without undue delay in order to preserve his or her right in this regard.

(d) Factors relevant to what constitutes undue delay include the complexity of the case, the conduct of the parties, the conduct of other relevant authorities, whether an accused is detained pending proceedings, and the interest of the person at stake in the proceedings.

Rights during a trial

55. In criminal proceedings, the principle of equality of arms imposes procedural equality between the accused and the public prosecutor.

(a) The prosecution and defence shall be allowed equal time to present evidence.

(b) Prosecution and defence witnesses shall be given equal treatment in all procedural matters.

(c) Evidence obtained by illegal means constituting a serious violation of internationally protected human rights shall not be used as evidence against the accused or against any other person in any proceeding.

56. The accused is entitled to a hearing in which an individualized consideration of culpability is afforded. Group trials in which many persons are involved may violate the person's right to a fair hearing.

57. In criminal proceedings, the accused has the right to be tried in his or her presence.

(a) The accused has the right to appear in person before the court.

(b) The accused may not be tried in absentia.

(c) If an accused is tried in absentia, the accused shall have the right to petition for a reopening of the proceedings upon a showing that inadequate notice was given, that the notice was not personally served on the accused, or that his or her failure to appear was for exigent reasons beyond his or her control. If the petition is granted, the accused is entitled to a fresh determination of the merits of the charge.

(d) The accused may voluntarily waive the right to appear at a hearing, but such a waiver shall be established in an unequivocal manner and preferably in writing.

58. The accused has the right not to be compelled to testify against him or herself or to confess guilt.

(a) Any confession or other evidence obtained by any form of coercion or force may not be admitted into evidence or considered as probative of any fact at trial or in sentencing. Any confession or admission obtained during incommunicado detention shall be considered to have been obtained by coercion.

(b) Silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent.

59. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

(a) The presumption of innocence places the burden of proof during trial in any criminal case on the prosecution. The criminal charge shall be proved to the intimate conviction of the trier of fact or beyond a reasonable doubt, whichever standard of proof provides the greatest protection for the presumption of innocence under national law.

(b) Public officials shall maintain a presumption of innocence. This provision applies to the judge presiding over the trial and to any other public official who deals with the case in any way. The accused is entitled to the benefit of the doubt during the trial. Public officials, including prosecutors, may inform the public about criminal investigations or charges, but shall not express a view as to the guilt of any suspect.

(c) Legal presumptions of fact or law are permissible in a criminal case only if they are rebuttable, allowing a defendant to prove his or her innocence.

(d) In applying the presumption of innocence, a State is not required to reimburse a person who has been found not guilty the cost of his or her defence.

(e) In applying the presumption of innocence, the State may not require a person who has been found not guilty of a criminal offence to pay any portion of the costs of prosecution.

60. The accused has a right to examine, or have examined, witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

(a) The adversary or contentious nature of a trial is regarded as one effective means of ensuring its fairness.

(b) The accused's right to obtain the attendance and examination of witnesses on his or her behalf may be waived by counsel if such a waiver is properly within the professional judgement of the counsel.

(c) The prosecution shall provide the defence with the names of the witnesses it intends to call at trial within a reasonable time prior to trial which allows the defendant sufficient time to prepare his or her defence.

(d) The accused's right to examine witnesses may be limited to those witnesses whose testimony is relevant and likely to assist in ascertaining the truth.

(e) The accused has the right to be present during the testimony of a witness. This right may be limited only in exceptional circumstances such as when a witness reasonably fears reprisal by the defendant, when the accused engages in a course of conduct seriously disruptive of the proceedings, or when the accused repeatedly fails to appear for trivial reasons and after having been duly notified.

(f) A trial may also be conducted in the absence of an individual accused of any offences against the peace and security of humanity, if that individual is a fugitive from justice or has died before the commencement of such a trial but when the consequences of the offences of which the person stands accused are still extant and the court examination is necessary for the protection of human rights and fundamental freedoms and to prevent perpetration of such offences in the future.

(g) If the defendant is excluded or if the presence of the defendant cannot be ensured, the defendant's counsel shall always have the right to be present to preserve the defendant's right to examine the witness.

(h) If the presence of the defendant or any party cannot be ensured when the sentence or decision is announced, measures shall be taken to ensure that the defendant or any other party is informed as quickly as possible concerning the substance of the verdict or decision and the possibility of appeal against it.

(i) If national law does not permit the accused to examine witnesses during pretrial investigations, the defendant shall have the opportunity to cross-examine the witness at trial.

(j) The use of testimony of anonymous witnesses during a trial is a violation of the defendant's right to examine witnesses against him or her.

Right to benefit from a lighter sentence or administrative sanction

61. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

62. A lighter penalty created any time before an accused's sentence has been fully served should be applied to any offender serving a sentence under the previous penalty.

63. Administrative tribunals conducting disciplinary proceedings shall not impose a heavier penalty than the one that was applicable at the time when the

offending conduct occurred. If, subsequent to the conduct, provision is made by law for the imposition of a lighter penalty, the person disciplined shall benefit thereby.

Second trial for same offence prohibited

64. No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Sentencing and punishment

65. Punishments constituting a deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

Appeal

66. Everyone convicted in a criminal proceeding shall have the right to review of his or her sentence by a higher tribunal.

(a) The right to appeal shall provide a genuine and timely review of the case. If exculpatory evidence is discovered after a person is tried and convicted, the right to appeal or some other post-conviction procedure shall permit the possibility of correcting the verdict if the new evidence would have been likely to change the verdict, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to the accused.

(b) A court shall stay execution of any sentence while the case is on appeal to a higher tribunal, unless the accused voluntarily accepts the earlier implementation of sentence.

67. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals become mandatory.

68. When a person has by a final decision been convicted of a criminal offence and when subsequently his or her conviction has been reversed or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

69. Every person convicted of a crime has a right to seek pardon, amnesty or commutation of sentence. Clemency, commutation of sentence, amnesty or pardon may be granted in all cases of capital punishment.

General clauses

70. There shall be no restriction upon or derogation from any element of the right to a fair trial and a remedy recognized or existing in any State

pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

71. Nothing in this Body of Principles shall be construed as restricting or derogating from any right defined in the International Covenant on Civil and Political Rights or any other relevant treaty or international instrument.

72. While this Body of Principles is not principally intended to apply to proceedings for juvenile offenders, there are certain protections that relate specifically to juvenile offenders. Juvenile offenders should be entitled to procedures no less protective of their rights than the rights provided in this Body of Principles and other international instruments, including the Convention on the Rights of the Child, General Assembly resolution 44/25 of 20 November 1989; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, adopted by the General Assembly in resolution 40/33 of 29 November 1985; and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by the General Assembly in resolution 45/113 of 14 December 1990.

73. No circumstances whatsoever, whether a threat of war, a state of international or non-international armed conflict, internal political instability or any other public emergency, may be invoked to justify derogations from the right to a fair trial or a remedy.

Use of terms

74. For the purposes of the Body of Principles:

(a) A "criminal charge" is defined by the nature of the offence and the nature and degree of severity of the penalty incurred. An accusation may constitute a criminal charge although the offence is not classified as criminal under national law.

(i) Criminal charges relate to all offences with penalties involving a serious deprivation of liberty. Imprisonment is always a serious deprivation of liberty. Expulsion from one's country by administrative decree is also a serious deprivation of liberty which requires the guarantees of a fair criminal trial.

(ii) Criminal charges do not constitute actions by disciplinary bodies when the penalty imposed is only a reprimand or warning.

(b) The "determination of rights and obligations in a suit at law" is defined by the character of the rights at issue. Civil rights and obligations include all proceedings that are decisive for private rights and obligations, including proceedings before administrative tribunals.

(i) Civil rights and obligations may be determined in proceedings involving such matters as bankruptcy, commitment to a mental institution, compensation claims against domestic

authorities, contractual rights and obligations, drivers' licences, family-related issues, health insurance benefits, labour disputes, land consolidation issues, libel, personal injury claims, professional employment qualifications and rights, property rights, and scope and ownership of patents, as well as other proceedings in which a person has the right to appear and present evidence.

(ii) Proceedings as to civil rights and obligations do not require that both parties to the proceedings be private persons; hence, such proceedings encompass hearings before administrative tribunals where one of the parties is a public authority and the other is a private person.

(c) "Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority.

(d) "Detained person" means any individual deprived of personal liberty except as a result of conviction for an offence.

(e) "Imprisoned person" means any individual deprived of personal liberty as a result of conviction for an offence.

(f) "Detention" means the condition of detained persons as defined above.

(g) "Imprisonment" means the condition of imprisoned persons as defined above.

Annex III

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